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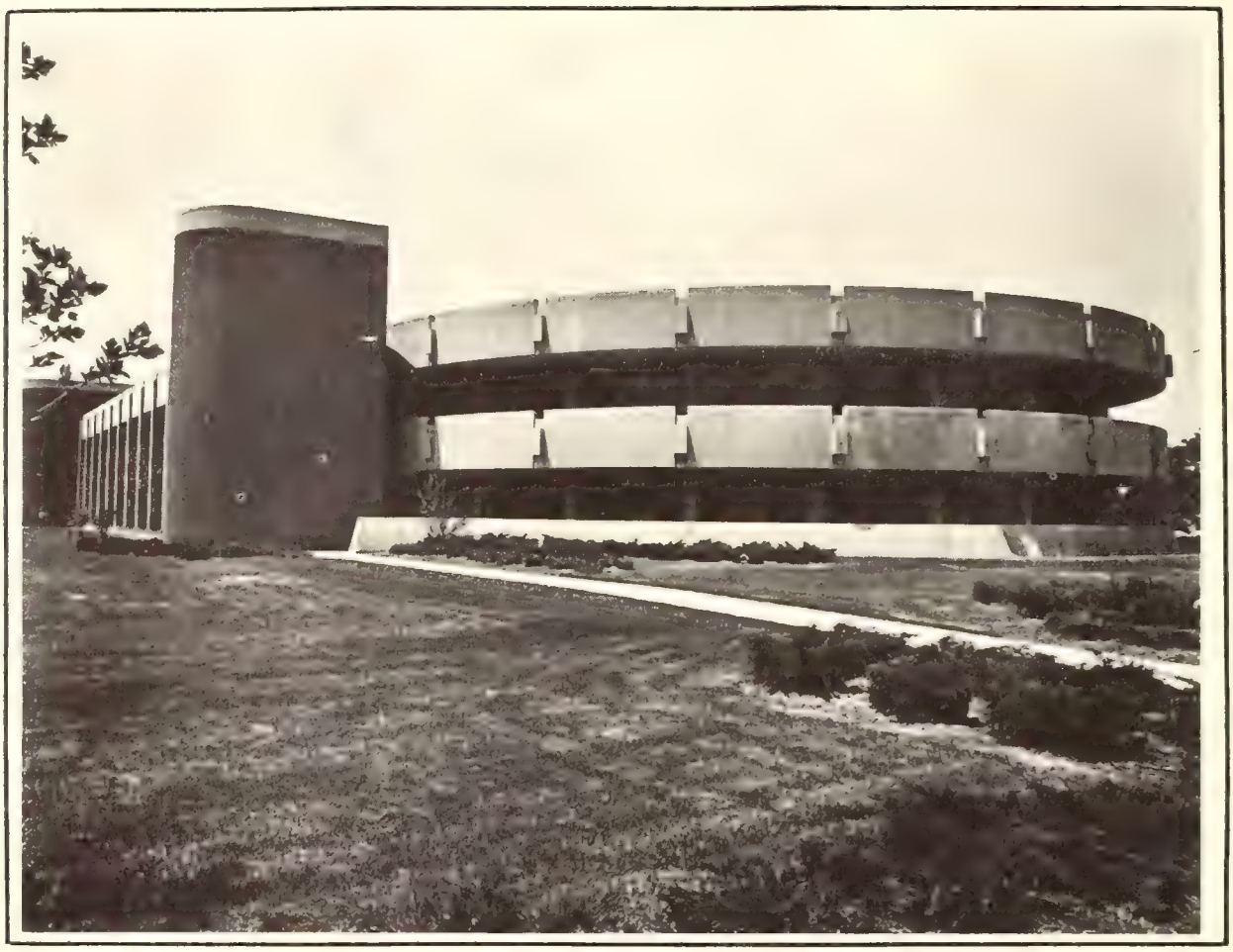
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Survey of Recent Developments in Indiana Law

The Board of Editors of the *Indiana Law Review* is pleased to publish its eighth annual Survey of Recent Developments in Indiana Law. This survey covers the period from June 1, 1979, through May 31, 1980. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal case and statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

I. Foreword: Products Liability

JORDAN H. LEIBMAN*

Indiana decisions during the survey period may have significantly reallocated product safety risks among sellers, users, third parties such as employers, and the general public. Because the costs of product liability judgments, settlements, litigation, insurance premiums, and accident prevention have been generally recognized as bearing major economic impact, the importance of these decisions to manufacturers, product users, and the increasing number of attorneys affected by those interests now demands closer attention.

A. Introduction: Product Liability and the Workplace Accident[1]

Of the fifteen product liability cases decided during this survey period, twelve involved workplace products, and of those, ten were

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[1]During the survey period, the Indiana Court of Appeals decided an unusual number of product liability cases which raised numerous significant questions of law with respect to workplace products. Several of these cases raise more than one important issue and, therefore, each case will be discussed at different points under varying legal topic headings. In order to avoid undue repetition, only the facts of each case relating to the topic under discussion will be presented under that topic. Although the reader may thus find the presentation of a particular case somewhat disjointed, the

cases in which the plaintiff was an injured worker.[2] It is appropriate, therefore, that this survey begin with a note on the special characteristics of product related accidents in the workplace.

Employees injured in the workplace generally recover through the state's worker compensation system. Yet, these claimants also represent 10.6 percent of the successful plaintiffs who recover under product liability theories,[3] with such workplace accidents accounting for 42 percent of the total national product liability payout for bodily injury.[4] That nearly half of the entire product liability dollar recovery goes to only 10.6 percent of the injured parties, suggests that workplace accidents are on average far more severe than those involving consumer products.

In addition to the increased severity of injury caused by workplace products, there are other significant differences between industrial and consumer products. The industrial product is generally longer lived than the consumer product and thus there is frequently a long time span between the manufacturer's act of placing its product

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method is consistent with the purpose of presenting a survey of recent legal developments.

[2]The following ten cases involved workplace products and what appear to be worker plaintiffs: Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979); Peck v. Ford Motor Co., 603 F.2d 1240 (7th Cir. 1979); Conder v. Hull Lift Truck, Inc., 405 N.E.2d 538 (Ind. Ct. App. 1980); American Optical Co. v. Weidenhamer, 404 N.E.2d 606 (Ind. Ct. App. 1980); Shanks v. A.F.E. Indus., Inc., 403 N.E.2d 849 (Ind. Ct. App. 1980); Moore v. Federal Prac. Elec. Co., 402 N.E.2d 1291 (Ind. Ct. App. 1980); Bemis Co. v. Rubush, 401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980; Hedges v. Public Serv. Co., 396 N.E.2d 933 (Ind. Ct. App. 1979) (The plaintiffs in *Hedges* are considered here as workers although they were acting as entrepreneurs, either as farmers or rodeo promoters, when they were injured by electricity which is considered here as a workplace product); Amermac, Inc. v. Gordon, 394 N.E.2d 946 (Ind. Ct. App. 1979); Martin v. Simplimatic Eng'r Corp., 390 N.E.2d 235 (Ind. Ct. App. 1979).

Stapinski v. Walsh Constr. Co., 395 N.E.2d 1251 (Ind. 1980), involved a workplace product but the plaintiff was a bystander who presumably was not acting in the scope of his employment at the time of injury. Ferdinand Furniture Co. v. R.M. Anderson, Co., 399 N.E.2d 799 (Ind. Ct. App. 1980), involved a workplace product but the injury alleged was damage to real and personal property only. Lukowski v. Vecta Educ. Corp., 401 N.E.2d 781 (Ind. Ct. App. 1980); Second Nat'l Bank v. Sears, Roebuck & Co., 390 N.E.2d 229 (Ind. Ct. App. 1979); Dias v. Daisy Heddon, 390 N.E.2d 222 (Ind. Ct. App. 1979), involved consumer products, but it is interesting that in all three cases the injured plaintiff was not the product purchaser.

A sixteenth case, Meadowlark Farms, Inc. v. Warken, 376 N.E.2d 122 (Ind. Ct. App. 1978), was decided during an earlier survey period but was not discussed in any survey issue. Because it is an important and widely cited Indiana case, it is included in this article. Product liability issues raised in the criminal reckless homicide case of State v. Ford Motor Co., No. 11-431 (Pulaski County Cir. Ct. (Ind.), Mar. 13, 1980) are also discussed in this article.

[3]INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS 62 (1977).

[4]*Id.*

into the stream of commerce and the moment of the worker-plaintiff's injury. Not only does this "long tail" present problems of proof as to the cause of the accident, but as the point of original sale recedes in time, the product manufacturer's influence over the use environment of the product diminishes.

Secondly, the potential for massive reproduction of dangerous design defects and manufacturing flaws, arguably a justification for application of strict liability to product manufacturers, may be less acute in the workplace context since workplace products are generally not mass-produced on the scale of consumer products. Likewise, the many layers of distribution found in the marketing of consumer products is not typical of industrial product marketing where the manufacturer and his customer are more intimately related. The industrial product customer is rarely the ultimate user; instead, his employee, under more or less economic pressure, is the party at risk from workplace product hazards. So, as among the workplace product manufacturer, the purchaser-employer, and the user-employee, it is the employer who is best positioned to make the greatest contribution to workplace product safety. In referring to the product manufacturer's inability to warn of or guard against injury *after* a product is sold, the court in *Shanks v. A.F.E. Industries, Inc.*[5] noted that "the manufacturer had no control over the work space, the machine, or the hiring, instruction, or placement of personnel . . . ."[6] It is the *employer* who selects the equipment, specifies the available equipment options, sensitizes the workplace to safety considerations, maintains and replaces the equipment, modifies components for new tasks, and provides first aid and other post-accident mechanisms.

Workplace product safety is for the most part controlled indirectly through statutes and regulations aimed at the employer. In addition to OSHA[7] and other state[8] and federal regulations,[9] the employer is also constrained by the pervasive worker compensation system which compensates workers injured by products and other causes while they are acting in the scope of their employment.[10] Worker compensation pays medical bills and a percentage of lost wages.[11] Pain and suffering is not compensable, but compensation for

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[5]403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

[6]*Id.* at 856-57.

[7]Occupational Safety & Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified in scattered sections of Titles 5, 15, 18, 29, 42, 49 U.S.C.).

[8]*See generally* IND. CODE §§ 22-1-1-1 to -11-15-6 (1976 & Supp. 1980).

[9]*See, e.g.*, Federal Mine Safety & Health Amendments Act of 1977, 30 U.S.C. § 801 (Supp. III 1979).

[10]*See* IND. CODE §§ 22-3-1-1 to -10-3 (1976 & Supp. 1980).

[11]*Id.*

rehabilitation may be available.[12] Although worker compensation is incomplete, it is certain and prompt, and involves substantially less friction costs than does the tort litigation system.

If an industrial product is a proximate cause of a workplace accident, recovery may be had under product liability theories from the industrial product manufacturer in one of three ways. First, the injured plaintiff may sue the manufacturer directly.[13] If the employee has already recovered worker compensation, his employer is given a statutory lien against the employee's judgment for an amount equal to what has been paid out in worker compensation.[14] Second, if the employee does not bring suit, the employer may sue the manufacturer directly, or as a subrogee to the rights of the employee.[15] Finally, the employer's insurance carrier may sue as a subrogee to the employer's rights.[16] However, if the employer was a misuser of the product, concurrent with a defect in the product, the claims of the employer and the employer's compensation insurance carrier will be barred under the Indiana Product Liability Act.[17]

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[12] *Id.* §§ 22-3-3-4 to -22. Although the statute does not provide specifically for rehabilitation, expenses for items such as plastic surgery and physical therapy are compensated as ordinary medical expenses.

[13] *Id.* § 22-3-2-13 which says:

> Whenever an injury or death, for which compensation is payable . . . shall have been sustained under circumstances creating in some other person than the employer . . . a legal liability to pay damages . . . , the injured employee . . . may commence legal proceedings against such other person to recover damages notwithstanding such employer's or such employer's compensation insurance carrier's payment of or liability to pay compensation. . . .

[14] *Id.* "[T]he said employer or such employer's compensation insurance carrier shall have a lien upon any settlement award, judgment or fund out of which such employee might be compensated from the third party." *Id.*

[15] *Id.*

> If said employee . . . shall fail to institute legal proceedings against such other person for damages within two (2) years after said cause of action accrues, the employer or such employer's compensation insurance carrier, having paid compensation, or having been liable therefor, may collect in their own name or in the name of the injured employee . . . the compensation paid or payable to the injured employee . . . .

Id.

[16] *Id.*

[17] *Id.* § 33-1-1.5-4(b)(2) (Supp. 1980) provides in part:

> Where the physical harm to the claimant is caused jointly by a defect in the product which made it unreasonably dangerous when it left the seller's hands and the misuse of the product by one other than the claimant, then the concurrent acts of the third party do not bar recovery by the claimant for the physical harm, but shall bar any rights of the third party, either as a claimant or as a subrogee.

A somewhat different allocation is provided for in the MODEL UNIFORM PRODUCT LIABILITY ACT § 111(B)(2) *reprinted in* 44 Fed. Reg. 62713, 62735 (1979) [hereinafter cited as MODEL ACT] which provides for a reduction of the judgment against the product manufacturer by an amount equal to the percentage of fault attributable to the misus-

It can be persuasively argued that this new provision of the Indiana Code[18] which tends to reallocate the risks of workplace accidents to a negligent or misusing employer does not go far enough. The Interagency Task Force on Product Liability in its final report[19] has given high priority to consideration of a proposal which would make worker compensation the sole remedy for workplace accidents.[20] Workers under the proposal would receive a quid pro quo in the form of higher compensation benefits for giving up their rights to third party actions against product manufacturers. Employers, however, would retain a right of action, or alternatively, access to an arbitration proceeding, for indemnity or contribution against product manufacturers of defective products proximately causing injury.[21] Establishing the employer as the primary obligor for workplace injuries seems consistent with his primacy in the workplace safety environment. The proposed scheme offers substantial reduction of friction costs and promises more frequent and speedier recoveries and generally more adequate awards. These benefits, though, may come at the expense of the intermittent but very uncertain huge award, justified by individual facts, but always hotly contested at great expense to the parties.[22] The cost of these contests has begun to have serious impact on the liability insurance delivery system and on the cost of a substantial number of products.[23]

These comments are offered in response to what appears to be a dramatic stripping away in recent years, accelerated in recent months, of the traditional defensive doctrines which have formerly tended to insulate manufacturers of products, especially workplace products, from product liability in Indiana.[24] In particular, this survey period

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ing employer (or co-employee), or by an amount paid out (or to be paid out) to the claimant in worker compensation, whichever is greater.

[18]IND. CODE § 33-1-1.5-4(b)(2) (Supp. 1980).

[19]U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT (1978) [hereinafter cited as FINAL REPORT].

[20]*Id.* at VII-103.

[21]*Id.* at VII-103-12.

[22]*See generally* J. O'Connell, First Party No-Fault Coverages as a Sole Remedy to Solve Many Tort Liability Problems (1977) (statement printed and distributed by Marsh & McLennan, Inc., 200 Clarendon Street, Boston, Mass. 02116).

[23]*See, e.g.*, Machinery and Allied Products Institute, Products Liability: A MAPI Survey (Aug. 1976) (available from MAPI, 1200 Eighteenth Street N.W., Washington, D.C. 20036); U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, BRIEFING REPORT ii (1977).

[24]Three important cases decided prior to the survey period which generally expanded the scope of liability of the workplace product manufacturer were Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977) (holding that the intended use of a motor vehicle is safe transportation not merely transportation, and therefore the manufacturer has a duty to provide reasonable protection for the user in the event of a collision); Kroger Co. v. Haun, 379 N.E.2d 1004 (Ind. Ct. App. 1978) (holding that the

has seen the substantial narrowing of the reach of Indiana's open and obvious danger rule,[25] the incurred risk defense as applied in the workplace,[26] and product misuse and later alteration defenses.[27] Also, the positive duty of the workplace product manufacturer to deploy safety devices or safeguards has been solidly affirmed, even when adequate warnings have been given.[28]

On the other hand, traditional causation requirements appear to have survived intact[29] and, for the present, the time of entry of a product into the stream of commerce at the moment of release or delivery by the seller remains unchanged.[30] Also, negligence per se rules remain subject to narrow interpretation in Indiana.[31] Thus, on balance, the duty of the Indiana seller of products has been significantly increased during this survey period, although perhaps no more so than has occured earlier in other more populous jurisdictions. But, at least thirty states have tempered their expansion of protection to the user and the consumer by adopting comparative fault principles which can reduce the plaintiff's award if his act or the act of a third person is a proximate cause of the injury.[32] The various comparative fault systems differ as to the percentage of fault attributable to the plaintiff where he may still recover something,[33]

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defendant must prove that plaintiff subjectively appreciated and voluntarily incurred a known risk); Gilbert v. Stone City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1976) (holding that a manufacturer has a duty to deploy feasible safety devices; lessors of products may be liable under § 402A of the RESTATEMENT (SECOND) OF TORTS (1965); and foreseeable bystanders are in the class of protected persons under § 402A in Indiana).

[25]*See* notes 41-71 *infra* and accompanying text.

[26]*See* notes 72-113 *infra* and accompanying text.

[27]*See* notes 114-66 *infra* and accompanying text.

[28]*See* notes 167-85 *infra* and accompanying text.

[29]*See* notes 214-71 *infra* and accompanying text.

[30]*See* notes 272-308 *infra* and accompanying text.

[31]*See* notes 309-43 *infra* and accompanying text.

[32]*See* Annot., 78 A.L.R.3d 339, 354-79 (1977). Thirty states have expressly adopted comparative fault principles in some form either by statute or judicial decision. For discussion of comparative fault concepts, *see, e.g.*, Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 MO. L. REV. 431 (1978); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974); Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797 (1977); Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373 (1978). For an excellent and recent summation of the national comparative fault picture, see Woods, *The Quickening March of Comparative Fault*, 85 CASE & COMMENT, July-August 1980, at 35.

[33]Some jurisdictions take the position that the plaintiff cannot recover if the plaintiff's negligence is greater than the defendant's. This system is referred to as the "modified" form of comparative fault. *See, e.g.*, VT. STAT. ANN. tit. 12, § 1036 (Supp. 1980); WIS. STAT. ANN. § 895.045 (West Supp. 1980). The so called "pure" form of comparative fault permits partial recovery even though plaintiff is more at fault than defendant. The MODEL ACT, *supra* note 17, § 111(A), follows the UNIFORM COMPARATIVE FAULT ACT, in adopting this latter approach.

the treatment of multiple party fault,[34] the nature of the plaintiff's conduct which is subject to the apportionment,[35] and the role of physical causation in the apportionment formula.[36] In general, the comparative fault concept appears to have met with approval as more successfully allocating the cost of accidents than does the "all or nothing system" of the common law.[37] In the workplace context, a comprehensive system of no fault compensation for the worker with equitable apportionment[38] of the cost of the accident between

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[34]Problems of apportionment arise when parties are absent from the product liability litigation. They may have been released, or may be immune, as in the case of employees or co-employees under worker compensation laws. The MODEL ACT provides for apportionment for such absent parties nevertheless. MODEL ACT, *supra* note 17, § 111(B)(1)-(2). Another problem arises under the modified comparative fault systems where the plaintiff must show that the defendant's fault was at least equal to the plaintiff's in order for the plaintiff to recover anything. Where two defendants are responsible for more than 50% of the accident, but neither defendant's fault exceeds the plaintiff's, how should the damages be apportioned? In Cartel Capital Corp. v. Fireco, 161 N.J. Super. 301, 391 A.2d 928 (1978), the court ruled that the plaintiff's negligence must be compared with that of each of the defendants individually and not in the aggregate.

[35]The problem is whether the plaintiff's contributory negligence should reduce plaintiff's award when the defendant is sued under *strict liability*. *See* Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (holding that the plaintiff's negligence can be compared with the defendant's strict liability). A more limited approach has been adopted in Florida where assumption of risk (but not contributory negligence) is a comparative fault defense. *See* West v. Caterpillar Tractor Co., 336 So. 2d 80, 90 (Fla. 1976). The MODEL ACT recognizes the problem but states "these concerns appear to be more theoretical than real." MODEL ACT, *supra* note 17, § 111(A) (analysis).

[36]Under comparative fault systems, the jury is instructed to apportion responsibility for the *fault* of the accident among the parties. The percentage of physical contribution to the cause of the accident is generally not a factor. *But see* General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977), where the jury was instructed to apportion the defect and the plaintiff's misuse on the basis of comparative causation. "The defense in a products liability case, where both defect and misuse contribute to cause the damaging event, will limit the plaintiff's recovery to that portion of his damages equal to the percentage of the cause contributed by the product defect." *Id.* at 352.

The *Hopkins* case has generated considerable literature. *See, e.g.*, Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403 (1978); Note, *The Defense of Misuse and Comparative Causation in Products Liability*, 14 HOUS. L. REV. 1115 (1977); Note, General Motors Corp. v. Hopkins: *The Misuse Defense When Design Defect and Plaintiff Misuse Concur to Cause Injury*, 31 S.W.L.J. 940 (1977).

[37]In negligence law, contributory negligence and assumption of risk are complete defenses barring the plaintiff's claims. In strict liability, contributory negligence, insofar as it is a failure to discover a defect or guard against a defect, is generally no defense, while unreasonable incurrence or assumption of a known and appreciated risk is a complete defense as is product misuse. *See* notes 94-113 *infra* and accompanying text (contributory negligence and incurrence of risk); and notes 114-34 *infra* and accompanying text (misuse).

[38]Uncomfortable with the mixing of "apples" (strict liability) and "oranges" (negligence) into a comparative fault system, the court in Daly v. General Motors Corp., 20

employer and product manufacturer based on comparative fault principles, would appear to be a development which is likely to be seriously considered by the courts or legislature[39] in Indiana in the not too distant future.[40]

B. Open and Obvious Dangers

The court in *Bemis Co. v. Rubush*[41] stated the open and the obvious rule, as recited by Indiana courts and the Seventh Circuit Court of Appeals, sitting in diversity, as follows:

> In the area of products liability, based upon negligence or based upon strict liability under §402A of the Restatement (Second) of Torts, to impress liability upon manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product. Although the manufacturer who has actual or constructive knowledge of an unobservable defect or danger is subject to liability for failure to warn of the danger, he has no duty to warn if the danger is open and obvious to all.[42]

Although the court recognized "the viability of the concept,"[43] it rejected the defendant's application of the rule and held that the obviousness of danger was only one factor to be weighed in determining whether a product was in a "defective condition unreasonably dangerous" as mandated by section 402A.[44] The court stated that

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Cal. 3d 725, 736, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978), suggested that the term "'equitable apportionment or allocation of loss' may be more descriptive than 'comparative fault.'"

[39] "The utility of comparative responsibility for product liability cases has been appreciated both by state legislatures[14] and courts.[15]" MODEL ACT, *supra* note 17, § 111(A) at 4 (analysis). The indicated footnotes list examples of states which have adopted comparative fault principles in the one instance by legislative enactment, or by judicial rule, in the other.

[40] *See* Vargo, *Comparative Fault: A Need for Reform of Indiana Tort Law*, 11 IND. L. REV. 829 (1978).

[41] 401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

[42] *Id.* at 56 (citing numerous prior Indiana cases).

[43] *Id.*

[44] *Id.* The RESTATEMENT (SECOND) OF TORTS § 402A (1965), says,

> Special Liability of Seller of Product for Physical Harm to User or Consumer. (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

other considerations for the trier of fact might include the ordinary knowledge of the community, the existence of feasible safeguards, the appreciation by the plaintiff of the danger, whether misuse of the product occurred, whether there was proper warning, and whether the product's danger was unavoidable.[45]

The court based its "only one factor" interpretation on research which revealed that Indiana courts, beginning with *J.I. Case Co. v. Sandefur*,[46] have recited the open and obvious danger rule only "in connection with the duty to warn where latent defects exist. Indiana courts have never faced an application of the rule straight-on."[47]

The *Bemis* court was probably referring to the often cited quotation from the *Sandefur* case: "On the other hand, there must be reasonable freedom and protection for the manufacturer. He is not an insurer against accident and is not obligated to produce only accident-proof machines. The emphasis is on the duty to avoid hidden defects or concealed dangers."[48] The *Sandefur* court had cited the New York case of *Campo v. Scofield*[49] to support this proposition, but, significantly, did not continue with the balance of the proposition presented "straight-on" in *Campo* which read: "Accordingly, if a remote user sues a manufacturer of an article for injuries suffered, he must allege and prove the existence of a latent defect or a danger not known to plaintiff or other users."[50] The use of the conclusory connective word, "accordingly," apparently induced many subsequent courts governed by Indiana law to convert an emphasis on latent defects into a rule which purports to absolutely bar any plaintiff injured by a defect found to be patent.

Of course, a duty to warn or guard against concealed dangers does not logically require that there be *no* duty to warn or guard against obvious dangers. On the other hand, it is clear that obviousness of danger is a factor which may serve to refute defectiveness. Where the probability of harm and its potential gravity is reduced by the plaintiff's presumed knowledge of the product's dangerous propensities, the manufacturer's burden to protect such a constructively knowledgeable plaintiff is correspondingly reduced, under either negligence law or strict tort. Where the product's

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[45]401 N.E.2d at 57.

[46]245 Ind. 213, 197 N.E.2d 519 (1964).

[47]401 N.E.2d at 56. *See* Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397 (1979) for analysis of cases decided under Indiana law in which the open and obvious danger rule played a part in the decision.

[48]245 Ind. at 222, 197 N.E.2d at 523.

[49]301 N.Y. 468, 95 N.E.2d 802 (1950) (*Campo* was later overruled in Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976)).

[50]301 N.Y. at 471, 95 N.E.2d at 803.

design calculus requires no more than an effective warning of a hazard, a second warning might be not only redundant but counterproductive as well.[51]

However, a single warning of obvious danger may not be enough to obviate a product's unreasonable danger. Sometimes special safety devices such as guards, shields, or alarms may be necessary to protect against mishaps. This need must be particularly recognized in the workplace context where fatigue and boredom can cause momentary, perhaps involuntary, inadvertance or damaging reflex movement.[52] Productivity in performing repetitive tasks often requires the establishment of rhythms which when interrupted can lead to disorientation followed by unexpected events, and then perhaps panic.[53] Such was apparently the scenario in the *Bemis* case where the plaintiff-employee was severely injured ten minutes into his shift by a descending steel shroud assembly hinged to a batt packing machine designed and manufactured by defendant Bemis. Rubush, as well as any others who may have observed the batt packer, must have been aware of the danager of the descending shroud, yet when Rubush's hand became caught by a bag clamp, he apparently panicked and momentarily forgot the hazard presented by the shroud. The court ruled that a jury could conclude that something more than the obviousness of the danger was necessary to protect such operators.[54]

The defendant argued that not only was the open and obvious danger rule an established rule of Indiana law,[55] but that it was mandated by the section 402A requirement that a product be proven unreasonably dangerous.[56] Bemis assigned error to the trial court's

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[51]*See* A. WEINSTEIN, A. TWERSKI, H. PIEHLER & W. DONAHER, PRODUCTS LIABILITY AND THE REASONABLY SAFE PRODUCT 64-68 (1978). "The overuse of warnings invites consumer disregard and ultimate contempt for the warning process." *Id.* at 68.

[52]*See* Elder v. Crawley Book Mach. Co., 441 F.2d 771 (1971). For technical information concerning boredom and fatigue and their relationship to industrial accidents, *see generally*, E. BENNETT, J. DEGAN & J. SPIEGEL, HUMAN FACTORS IN TECHNOLOGY 43-60 (1963); H. HEINRICH, INDUSTRIAL ACCIDENT PREVENTION 340-43 (3d ed. 1950); L. SIEGEL, INDUSTRIAL PSYCHOLOGY 248-65 (rev. ed. 1969). *See also* Note, *Assumption of Risk in Employee Plaintiff Products Liability Cases in Indiana* (1978) (unpublished student note on file in the office of the INDIANA LAW REVIEW).

[53]*See* Faulkner, *Variability of Performance in a Vigilance Task*, 46 J. APPLIED PSYCH. 325 (1962) for an excellent discussion of the impedance of accurate response as a result of prolonged vigilance at a certain task. *See also* Bertelson and Joffe, *Blockings in Prolonged Serial Responding*, 6 ERGONOMICS 109 (1963) for experimental data offering proof of increased reaction times as a result of the fatigue which occurs in subjects performing continuous tasks.

[54]401 N.E.2d at 57.

[55]"Bemis argues that the open and obvious concept as recited by the above cases states a separate doctrine . . . ." *Id.* at 56.

[56]*Id.* at 55 (§ 402A is reprinted at note 44 *supra*).

refusal to give its tendered instruction defining unreasonably dangerous.[57] The trial court's instruction no. 1, "[T]he batt packing machine must be 'dangerous to an extent beyond that which would be contemplated by an ordinary consumer who purchased the batt packer or for those whose use it was intended,'" was consistent with comment i of §402A.[58]

To discover the basis of Bemis' objection, it is necessary to refer to its brief in support of its petition to transfer wherein it stated:

> In other words, an open and obvious or patent danger cannot, by definition, be unreasonable because if the danger is open and obvious, it is within the contemplation of the ordinary user or consumer with the ordinary knowledge common to the community as to the product's characteristics. If the danger is found to be open and obvious, that ends the inquiry, since the basic premise for the imposition of section 402A liability is lacking.[59]

Summarized, the proposition which emerges is that the dangers the ordinary user or consumer is aware of in the product are dangers which the ordinary consumer would "contemplate." But surely the word contemplation means something more than mere awareness or even appreciation. The contemplating viewer also considers "with a view of accomplishing; intend; plan . . . to treat of as contingent or possible. . . ."[60] To determine what the ordinary user contemplates with respect to the product he uses, the seller must go beyond the consumer's mere awareness, and even beyond his appreciation of danger, to the level of safety and protection the ordinary consumer thinks is contingent, possible or intended—in short, what he thinks is appropriate to the product. What is appropriate may in some cases be only what the user observes and appreciates; but, at times, it may be something more.

Commentators have had difficulty with this "consumer contemplation [or expectation] test" because of the ambiguity arising out of the words expectation and contemplation. Professors Wade and Keeton have suggested that using a seller's perspective together with principles of ordinary negligence or negligence per se

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[57]401 N.E.2d at 58.

[58]*Id.* at 59. RESTATEMENT (SECOND) OF TORTS § 402A (1965), Comment i, provides in part: "The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer."

[59]Brief in Support of Appellant's Petition to Transfer at 30-31, Bemis Co. v. Rubush, 401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

[60]FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 567 (1963) (definition of "contemplate").

will clear up the difficulty. Under strict tort, the manufacturer is imputed to have knowledge of the dangerous propensities of its product.[61] With such imputed knowledge he is expected to balance magnitude of risk against burden of protecting against harm. If risk outweighs burden, the product is in a defective condition unreasonably dangerous.[62]

The consumer contemplation test interpretation submitted by Bemis Co. was followed in one Indiana diversity case. In *Burton v. L.O. Smith Foundry Products Co.*,[63] the manufacturer specified kerosene as a solvent for its product, a mold parting compound. When the plaintiff alleged that less flammable solvents were available, the court held that the manufacturer was not liable inasmuch as the dangers of kerosene were apparent. It is difficult to see how this broad an interpretation of the open and obvious danger rule can advance the objective of section 402A, comment c, which states that the consumer "is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products."[64]

The critical distinction between "open" and "obvious" in the rule should also be noted. Although the rule is based on the objective perspective of the ordinary consumer, mere openness or physical visibility of the hazardous instrumentality is insufficient to avoid liability to the seller. In *Dudley Sports Co. v. Schmidt*,[65] the lack of a guard around the throwing arm of a pitching machine was completely open to the ordinary user, yet the court held that the potential of the arm to deliver a serious blow even when unplugged was a "latent danger."[66] In *Zahora v. Harnischfeger Corp.*,[67] the physical characteristics of a crane cab were also entirely open, yet the court

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[61]Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 834 (1973). *See also* Dias v. Daisy-Heddon, 390 N.E.2d 222, 227 (Ind. Ct. App. 1979).

[62]Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 37-38 (1973); Wade, *supra* note 61, at 834-35. The risk-utility analysis adopted by professors Keeton and Wade is derived from negligence principles. The best known summary of this economic efficiency approach, is the calculus of risk to be found in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (the "Learned Hand Test"). This test is also found in RESTATEMENT (SECOND) OF TORTS § 291 (1965) expressed as follows:

> Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

[63]529 F.2d 108 (7th Cir. 1976).

[64]RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965).

[65]151 Ind. App. 217, 279 N.E.2d 266 (1972).

[66]*Id.* at 226-27, 279 N.E.2d at 274.

[67]404 F.2d 172 (7th Cir. 1968).

noting the manufacturer's duty to avoid hidden dangers,[68] held in reversing summary judgment for the defendant that the crane cab could have been negligently designed because the design may not have permitted a sufficient field of vision for the operator.[69]

Moreover, as the court emphasized in *Bemis*, there is always the question of determining what is the "ordinary knowledge in the community":

> It is to be expected that certain products, whose dangers are obvious and commonly known, such as a sharp knife, an ax, or dynamite, would not be actionable under § 402A because, while dangerous, and capable of causing harm, they would not be unreasonably dangerous because their characteristics are contemplated by the ordinary consumer with ordinary knowledge in the community. Prosser, Law of Torts § 96, p. 649 (4th ed. 1971). With other products, embodying complex and sophisticated technology, incomprehensible to all but practitioners of the art, the dangers are not so obvious and may not be appreciated by an ordinary consumer with ordinary knowledge in the community, even though the dangers may be appreciated by the sophisticated.[70]

Because a broad open and obvious danger rule does not distinguish between the duty to warn and the duty to guard; requires distinguishing superficial awareness from appreciation of danger; requires a difficult determination of ordinary consumer knowledge; and above all, discourages the development of safer products, it has lost vitality in many jurisdictions which have recently considered it.[71]

C. Incurred Risk

1. Incurred Risk and the Open and Obvious Danger Rule.—In *Bemis Co. v. Rubush*,[72] instructions tendered by Bemis "which would have told the jury that if the dangers were open and obvious, the plaintiff was precluded from recovery,"[73] were rejected by the trial

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[68]*Id.* at 176.

[69]*Id.* at 174-78.

[70]401 N.E.2d at 57.

[71]*See, e.g.*, Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966); Nichols v. Union Underwear Co., 602 S.W.2d 429 (Ky. 1980); Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976), *overruling* Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950). *See also* Note, *supra* note 47, at 415-22 in which the above cases are discussed.

[72]401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

[73]*Id.* at 58.

court. The appellate court noted that "[t]he open and obvious rule has further application where the defense of incurred risk is asserted."[74] The court characterized incurred risk by stating that it "is concerned with voluntariness and involves a mental state of venturousness. It has a subjective quality. Incurred risk is concerned with a user's age, experience, knowledge, and understanding, as well as the obviousness of the defect and the danger it poses."[75] Bemis' tendered instructions sought to convert the obviousness of danger into incurred risk as a matter of law without reference to the plaintiff's subjective state. Instead, the trial court submitted an instruction which "told the jury that they *could* consider any open and obvious characteristics of the machine in determining whether the machine was defective and unreasonably dangerous, and whether the plaintiff incurred the risk of injury from that condition."[76] The appellate court found no error in the trial court's instruction.

Indiana's open and obvious danger rule is generally traced to New York's *Campo v. Scofield*.[77] When *Campo* was overruled in *Micallef v. Miehle Co.*,[78] the court stated:

> More specifically, it is contended that the application of *Campo* amounts to an assumption of risk defense as a matter of law "with the added disadvantage that the defendant was relieved of the burden of proving that plaintiff had subjectively appreciated a known risk." *Campo* is viewed as inconsistent because, on the one hand, it places a duty on the manufacturer to develop a reasonably safe product yet eliminates this duty, thereby granting him immunity from answering in damages, if the dangerous character of the product can be readily seen, irrespective of whether the injured user or consumer actually perceived the danger.[79]

2. Incurred Risk and the Workplace Accident.—The trial court in *Bemis Co. v. Rubush*,[80] instructed the jury that an employee who followed his employer's order and operated a machine known by the employee to be dangerous "does not necessarily incur the risk of his injury if the nature of his employment requires exposure to certain hazards and if the apparent danger is such that a man of ordinary prudence would take the risk in order to comply with his employer's

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[74]*Id.*

[75]*Id.*

[76]*Id.* (emphasis added).

[77]301 N.Y. 468, 95 N.E.2d 802, 95 N.Y.S.2d 610 (1950).

[78]39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

[79]*Id.* at 384, 348 N.E.2d at 576, 384 N.Y.S.2d at 120.

[80]401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

order."[81] Bemis, relying on *Meadowlark Farms, Inc. v. Warken*,[82] assigned error to the instruction. The court distinguished *Meadowlark Farms* on the ground that it was a negligence case whereas *Bemis* was brought under strict tort.[83]

In *Meadowlark Farms*, the plaintiff Warken, a sharecropper, was injured when he slipped onto an unguarded corn auger which had been provided by his landlord, the defendant. Presumably strict tort would not apply because the defendant was not in the business of selling or leasing corn augers.[84] The defendant asserted that Warken had assumed the risk[85] presented by an unguarded corn auger because he had impliedly contracted to "assume the risk of all incidental and ordinary hazards, and all incidental and extraordinary hazards of which he has notice although not assumed when the employment commenced."[86] The court affirmed this nineteenth century rule but Warken was nevertheless permitted to recover after the court determined that the hazard presented by the auger was incidental but *extraordinary* because it arose after the contractual relationship had been entered into. In the case of such extraordinary

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[81] *Id.* at 60.

[82] 376 N.E.2d 122 (Ind. Ct. App. 1978).

[83] 401 N.E.2d at 61. It should be noted that the plaintiff employee's incurrence of risk under this rule arises under an implied contract between the employer and employee. *See* Brazil Block Coal Co. v. Hoodlet, 129 Ind. 327, 331, 27 N.E. 741, 743 (1891). It is highly questionable whether the employee's risk incurrence should extend to risks created by third party product manufacturers such as Bemis.

[84] RESTATEMENT (SECOND) OF TORTS § 402A(1)(a) (1965). This section says, "[T]he seller is engaged in the business of selling such a product . . . ." This provision was held to apply to lessors in Gilbert v. Stone City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1976).

[85] "In the case at bar the parties apparently agree that the doctrine of assumed risk applies (rather than incurred risk), based on the landlord-tenant sharecrop agreement which created a contractual relationship." 376 N.E.2d at 132.

[86] *Id.* (citing Brazil Block Coal Co. v. Hoodlet, 129 Ind. 327, 27 N.E. 741 (1891)). The *Brazil Block* court stated that it regarded "the rule *within proper limits* as a wise and just one." *Id.* at 332, 27 N.E. at 743 (emphasis added). The court noted that a worker would not be deemed to assume the risks of hazards his employer had promised to repair, *id.*, nor would he be deemed to have assumed the risks of hazards "not connected with his work." *Id.* at 334, 27 N.E. at 743. The court observed, however, that "[t]he servant does not stand on the same footing with the master." *Id.* at 335, 27 N.E. at 744. The court then held that a worker who accepts a hazardous job assignment will not *necessarily* be deemed to have assumed the risk:

> If the apparent danger is such that a man of ordinary prudence would not take the risk, the servant acts at his peril. But unless the apparent danger is such to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed, and if he is injured the master must respond in damages.

Id. at 336-37, 27 N.E. at 744.

hazards the court held that there should be no presumption of appreciation of the risk, as there would be if the hazard were incidental and ordinary;[87] "the danger and risk must be actually known and appreciated before it is assumed."[88] The jury was therefore permitted to find that Warken's appreciation of the combination of an unguarded auger, and a slippery ground cover surrounding the auger, did not rise to the threshold of risk assumption.[89] The jury was also permitted to consider the issue of voluntariness, inasmuch as Warken's written express contract with Meadowlark *required* him to store grain with the defendant.[90] Whether a typical unwritten master-servant employment contract creates a comparable level of *legal* compulsion upon an ordinary employee so as to negate the voluntary conduct requirement of the incurred risk defense in Indiana remains doubtful.

On the other hand, the question of *economic* compulsion on the employee was raised indirectly in the *Bemis* case. The court acknowledged that for the most part, an employee who encounters a known and appreciated risk and then proceeds to accept it, does so voluntarily. But there are instances, the court held, where the acceptance of a known hazard is reasonable for an employee under the circumstances.[91] Under strict tort, an incurred or assumed risk defense is only available where the risk taker acts unreasonably. Under the negligence rubric, however, *reasonable* assumption of risk may be a defense. The court in *Meadowlark Farms* had quoted:

> "Where one voluntarily and knowingly places himself in a certain environment, or undertakes to use a certain instrumentality, and as a consequence receives an injury, his right to recover therefor may be defeated by the doctrine of the assumption of risk, where the contractual relation exists, or by the doctrine of incurred risk where the relation is non-contractual, *even though he may have exercised due care for his own safety* . . . ."[92]

The *Bemis* court stated that "[w]hile the defense of incurred risk in negligence law is that one incurs all the ordinary and usual risks of an act upon which he voluntarily enters . . . the defense of incurred risk under § 402A is that '[i]f the user . . . discovers the defect . . . and . . .

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[87]376 N.E.2d at 132-33.

[88]*Id.* at 133.

[89]*Id.* at 133-34.

[90]*Id.*

[91]401 N.E.2d at 61.

[92]376 N.E.2d at 132 (quoting Pittsburgh, C.,C. & St. L.R.R. v. Hoffman, 57 Ind. App. 431, 439, 107 N.E. 315, 318 (1914) (emphasis added)).

proceeds unreasonably . . . he is barred from recovery.' "[93] The jury in *Bemis* would therefore be permitted to find that the plaintiff's acceptance of a hazardous job assignment was reasonable and thus an incurred risk defense under strict tort's section 402A would not lie.

3. Incurred Risk and Contributory Negligence.—A recurring problem in determining whether a plaintiff has incurred a known risk is that of momentary forgetfulness. A user may be fully aware and appreciative of a hazard prior to the time of an accident but he may lose that awareness through inadvertence or inattention and be injured as a result.

Although the problem of inadvertence is particularly relevant to the workplace environment where performance of repetitive tasks generates boredom, fatigue, and soporific rhythms, the issue was raised during the survey period in a slip and fall case. In *Gerrish v. Brewer*,[94] the plaintiff-appellant assigned error to an instruction in which the trial court failed to tell the jury that the plaintiff must be aware of the hazard at the time of the accident and that mere prior knowledge of the hazard would not constitute incurred risk.[95] The court held that such an addition to the incurred risk instruction would be unnecessary and redundant inasmuch as incurred risk required, by definition, a consciousness of the risk;[96] "[i]t is difficult to perceive how a plaintiff could consciously, deliberately and intentionally encounter a risk he had forgotten about."[97]

On the other hand, momentary forgetfulness might represent unreasonable conduct and therefore constitute contributory negligence. Recognizing that even prudent people sometimes reasonably forget the existence of a hazard, the court suggested that an instruction may be appropriate which states that " 'the mere fact of previous knowledge does not *per se* establish *contributory negligence.*' "[98]

The court in *Gerrish* did find error in the trial court's incurred risk instruction because the instruction provided for an objective test of the plaintiff's conduct with respect to incurrence of risk: "If you find, therefore, that the plaintiff knew, or in the exercise of reasonable and ordinary care, should have known. . . ."[99] The ap-

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[93]401 N.E.2d at 61 (quoting RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965)).

[94]398 N.E.2d 1298 (Ind. Ct. App. 1979).

[95]*Id.* at 1299-1300.

[96]*Id.* at 1301. *See* notes 52-53 *supra* and accompanying text.

[97]398 N.E.2d at 1301.

[98]*Id.* at 1300 (quoting Town of Argos v. Harley, 114 Ind. App. 290, 305, 49 N.E.2d 552, 557 (1943)).

[99]398 N.E.2d at 1299.

pellate court cited *Kroger Co. v. Haun*,[100] which was decided after *Gerrish* was tried, to support its holding that "constructive knowledge has no place in determining incurred risk."[101] The objective reasonable man test applies to a finding of contributory negligence which is not, without more, a defense to a strict liability claim, whereas incurred risk, where the plaintiff acts unreasonably, is a defense to strict tort.[102]

In *Moore v. Federal Pacific Electric Co.*,[103] the plaintiff appealed from summary judgment which held him to be contributorily negligent and to have incurred the risk to himself as a matter of law.[104] Moore's action against the manufacturer of an electrical switch box was brought under negligence, strict liability, and breach of implied warranty theories. Incurred risk was a defense to all three theories, but contributory negligence was only a defense to negligence.[105]

The plaintiff knew that the switch box was energized and that there were several precautions he might have taken to avoid the accident. He claimed, however, that his actions were reasonable, that he had no subjective knowledge of the hazards posed by this type of switch box because it was new to him, and that the switch box's defective design proximately caused his injury. To support his claim of reasonable conduct, the plaintiff presented evidence that other prudent electricians customarily worked on energized switch boxes. The appellate court held that an issue of fact was thus raised, and summary judgment on the issue of contributory negligence was error, inasmuch as reasonable men could have reached more than one conclusion.[106] To support his claim that he had no subjective knowledge of the hazard, the plaintiff presented evidence of his lack of familiarity or experience with bolt-on switch boxes as opposed to the plug-in type with which he was familiar. The court held this evidence also raised an issue of fact which precluded summary judgment on the issue of incurred risk.[107] The exact design defect had not yet been identified.

The question of contributory negligence as a matter of law was

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[100]379 N.E.2d 1004 (Ind. Ct. App. 1978).

[101]398 N.E.2d at 1300. The court's finding with respect to constructive knowledge was dictum, however, because the appellant had failed to raise the issue in the trial court. *Id.*

[102]*See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

[103]402 N.E.2d 1291 (Ind. Ct. App. 1980).

[104]*Id.* at 1292-93.

[105]*Id.* at 1293.

[106]*Id.* at 1295.

[107]*Id.*

earlier raised in *Meadowlark Farms, Inc. v. Warken*[108] by a defendant who argued for that holding because there existed, he asserted, a safer method than the plaintiff's for unloading corn from a truck into a corn auger. The court stated the "test for negligence 'as a matter of law' to be that negligence which is so clear and palpable that no verdict could make it otherwise."[109] The court found that the plaintiff's unloading system was "used by other farmers and that his manner of operating the endgate was not unusual,"[110] and also noted that "[b]ecause an activity or conduct is dangerous does not as a matter of law legally result in the conclusion that such conduct or activity was negligent."[111]

The court agreed with the defendant that "Indiana courts have approved the rule that a plaintiff is contributorily negligent as a matter of law if his knowledge and appreciation of the dangers, inherent in his enterprise and of the defendant's creation, surpassed or equalled that of the defendant."[112] However, the court found the defendant had notice of a prior accident, was aware of the severity of injury presented by the auger, and had already fashioned a guard to prevent a recurrence of harm. Defendant, therefore, was held to have had greater knowledge than plaintiff and contributory negligence as a matter of law was precluded.[113]

D. Misuse and Later Alteration

1. "Unintended" v. "Not Reasonably Foreseeable;" a Historical Note.—During the survey period the issues of misuse and later alteration were addressed in more than one case. To fully appreciate the courts' approaches a historical note is in order.

a. Misuse.—Courts controlled by Indiana law have developed two approaches for dealing with product misuse. The first, as exemplified in the seminal California case, *Greenman v. Yuba Power Products, Inc.*,[114] delimits the scope of the seller's liability by reference to the intended use of the product. The *Greenman* court stated:

> To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of

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[108]376 N.E.2d 122 (Ind. Ct. App. 1978).
[109]*Id.* at 130.
[110]*Id.*
[111]*Id.* at 131.
[112]*Id.*
[113]*Id.*
[114]59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

> a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.[115]

This approach has been followed by the Seventh Circuit Court of Appeals in motor vehicle diversity cases governed by Indiana law. The early case of *Evans v. General Motors*[116] took a narrow view of the intended use of an automobile and held that any purpose other than transportation or handling of the car which was not necessary to achieve that purpose would fall outside the scope of liability.[117] Thus any handling resulting in collision would be a misuse and no duty would accrue to the manufacturer to foresee and deal with such unintended purposes and handlings. Although the *Evans* subjective test for product use intent was later widened to include the ordinary consumer's contemplation,[118] still no duty to foresee product uses falling outside the expanded intended use spectrum would be required under an intended use formulation. In *Schemel v. General Motors*,[119] the court rejected plaintiff's claim that the manufacturer had a duty to foresee that its car would be driven at very high speed and in *Latimer v. General Motors*,[120] the court said:

> In essence, the plaintiff attempts to graft onto his theory of strict liability an element of foreseeability. Latimer asserts that a manufacturer should anticipate a "misuse" of the product and design safeguards against that contingency. Such is not the law.
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> *Schemel v. General Motors* . . . stands for the proposition that a manufacturer is under no obligation to foresee and to guard against a danger that results from a misuse of the product.[121]

Nine months after the *Latimer* decision, the seventh circuit handed down *Huff v. White Motor Corp.*,[122] which introduced a foreseeability element into the intended use formulation. Taking notice of the great frequency of motor vehicle accidents which occur on American highways, the court opted to follow the now over-

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[115]*Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

[116]359 F.2d 822 (7th Cir. 1966).

[117]*Id.* at 825.

[118]*See* Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965). "[U]se different from or more strenuous than that *contemplated to be safe by ordinary users/consumers*, that is 'misuse,' would either refute a defective condition or causation." *Id.* at 429 (emphasis added).

[119]384 F.2d 802 (7th Cir. 1967).

[120]535 F.2d 1020 (7th Cir. 1976).

[121]*Id.* at 1024.

[122]565 F.2d 104 (7th Cir. 1977).

whelming majority rule from the *negligence* case of *Larsen v. General Motors Corp.*[123] In *Larsen* it was held that a determination of intended use had to realistically include the foreseeable ordinary use environment of the product, which of necessity would include some handlings and purposes that could only be characterized as undesirable and unsafe. The *Huff* court, however, did not entirely discard its earlier approach to product misuse. The court explained:

> Although the trial court in addition to *Evans* cited *Schemel v. General Motors Corp.* . . . as controlling in this case, *Schemel* actually dealt with a misuse of the vehicle and analytically is not apposite. *See Latimer v. General Motors Corp.* . . . . Insofar as the decision in *Schemel* rests on *Evans*, it is overruled along with *Evans*.[124]

Thus the court created an uncertainity; some undesirable and unsafe conduct would have to be anticipated because it would be *within* the ordinary use environment of the product, but other undesirable and unsafe acts which could be labeled misuse would fall outside these limits and no duty to foresee those acts or events would be required of the seller.

A second approach to product misuse in Indiana treats such conduct as an affirmative defense to strict liability in tort which can refute defect or causation. The entire formulation is stated in *Perfection Paint & Color Co. v. Konduris*,[125] and it includes a reasonable foreseeability element: "[T]he defense of misuse is available when the product is used 'for a purpose not reasonably foreseeable to the manufacturer' or when the product is used 'in a manner not reasonably foreseeable for a reasonably foreseeable purpose.' "[126] The court noted that conduct labeled misuse could overlap with contributory negligence and incurred risk but the "true category of misuse" is "misuse of a product which does not exhibit any defective condition until misused, or which does not appear to be defective and unreasonably dangerous."[127] The court in its definition of misuse also adopted the formulation from *Greeno v. Clark Equipment Co.*[128] in which it was stated that "use different from or more strenuous than that contemplated to be safe by ordinary

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[123]391 F.2d 495 (8th Cir. 1968). The *Huff* court noted that only two states in addition to Indiana followed *Evans* whereas thirty jurisdictions followed *Larsen*. 565 F.2d at 110-11.

[124]565 F.2d at 106 n.1.

[125]147 Ind. App. 106, 258 N.E.2d 681 (1970).

[126]*Id.* at 119, 258 N.E.2d at 689.

[127]*Id.*

[128]237 F. Supp. 427 (N.D. Ind. 1965).

user/consumers, that is, 'misuse,' would either refute a defective condition or causation."[129]

Although both the expanded intended use formulation of *Huff* and the "not reasonably foreseeable" purpose or handling formulation of *Konduris* now require the seller to foresee mishaps occurring in the field with respect to his products, there is doubt that the scope of foreseeability of these two formulations is necessarily congruent. *Huff* adopted the *Larsen* rule of expanded intended use. *Larsen*, a negligence case, relied heavily on the actual notice that automobile manufacturers had of improper driving conduct which led, and continues to lead, to frequent collisions.[130] *Konduris* on the other hand, purported to set out the misuse standard under strict liability. Under strict tort, actual notice of the harmful propensities of a product is not required; such knowledge is imputed to the manufacturer.[131] Unless harmonized by the courts, there would appear to be greater scope of foreseeability under the *Konduris* formulation than under *Huff*.[132]

In 1978, the Indiana legislature enacted a Product Liability statute which purported to codify and restate "the common law of this state with respect to strict liability in tort."[133] Under section 4,

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[129]*Id.* at 429.

[130]Automobiles are made for use on the roads and highways . . . . This intended use cannot be carried out without encountering in varying degrees the *statistically proved* hazard of injury-producing impacts of various types. The manufacturer should not be heard to say that it does not intend its product to be involved in any accident when it can easily foresee and when it *knows* that the *probability . . . is high*, that [the product] will be involved in some type of injury-producing accident. . . . *[O]ne-fourth to two-thirds* of all automobiles . . . are involved in an accident.

391 F.2d at 501-02 (emphasis added).

[131]*See* note 62 *supra* and accompanying text.

[132]That Indiana courts have recognized the need to harmonize these two formulations, and have undertaken to do so, is revealed in Conder v. Hull Lift Truck, Inc., 405 N.E.2d 538 (Ind. Ct. App. 1980). *See* notes 141-62 *infra* and accompanying text.

[133]IND. CODE §§ 33-1-1.5-1 to -8 (Supp. 1980). See Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 238-58 (1979), for an analysis of this statute. The Indiana Product Liability statute recently survived a vigorous challenge at the trial level. In Dague v. Piper Aircraft Corp., No. S79-293 (N.D. Ind. May 27, 1980), the federal district court ruled that subsection 5 of that statute was indeed a repose provision which provided for an outer cutoff of seller's liability ten years after the initial delivery of the product. The plain language of the subsection appears to give the plaintiff a choice of limitation periods—either two years from the date of the accident *or* ten years from the date of initial delivery: "[A]ny product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user. . . ." IND. CODE § 33-1-1.5-5 (Supp. 1980). The *Dague* court found that the use of the disjunctive "or" in this subsection was a drafting error and was inconsistent with the intent of the legislature which was clearly to limit sellers' liability, not increase it.

"Defenses to strict liability in tort," subsection (b)(2) provides in part that "[i]t is a defense that a cause of the physical harm is a non-

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Dague v. Piper Aircraft Corp., at 2-3, 5. The plaintiffs' interpretation, held the court, would also reduce the remaining language of the subsection, "except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues," IND. CODE § 33-1-1.5-5 (Supp. 1980), to mere surplage. Dague v. Piper Aircraft Corp., at 5.) For a discussion of this drafting problem raised by the statute, see Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 250 (1979), which was cited and quoted by the *Dague* court. The court also ruled that the defendants' absence from the state did not toll this statute of limitation (or repose) inasmuch as the Indiana Secretary of State was at all times available as a statutory agent to accept service of process for an out-of-state corporation doing business in Indiana. Dague v. Piper Aircraft Corp., at 8.

The plaintiff also mounted an equal protection challenge to the repose provision of the statute arguing that third party product owners were discriminated against in favor of manufacturers, and consumers and users of old products were discriminated against in favor of consumers and users of new products. The court, however, held that neither of these classification systems involved a suspect class requiring strict scrutiny. *Id.* at 9. Because the schemes were not arbitrary or unreasonable, inasmuch as they were the result of the Indiana General Assembly's response to a serious product liability insurance problem, they were held to pass constitutional muster on equal protection grounds. *Id.* at 9-10.

The *Dague* court also ruled that the Indiana General Assembly had the right to abolish rights recognized under the common law if those rights were not vested. *Id.* at 10-11. The plaintiff had apparently invoked the provision in the Indiana Constitution which gives persons access to our courts and a right to a remedy for injury. IND. CONST. art. I, § 12 provides: "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. . . ." This provision, variations of which appear in a number of state constitutions, has provided the basis for challenge to repose statutes enacted to limit the negligence liability of architects and builders to a limited number of years following a building's construction. A plaintiff injured after the limitation period can argue, however, that the repose provision has denied him a remedy and access to the state courts. Jurisdictions have split on this issue. The *Dague* court, however, opted to follow Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972), in which that court took the view that a repose provision did not actually bar a cause of action but simply had the effect of preventing a cause of action from ever arising and thus no vested right was disturbed. But in Overland Construction Co. v. Simmons, 369 So. 2d 572 (Fla. 1979), the Florida Supreme Court held that a party injured after a repose period had passed would have no access to a judicial forum were the limitation period to be given effect. To abolish such a right without providing a reasonable alternative was held violative of article I, section 21 of the Florida Constitution which provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." FLA. CONST. art. I, § 21. The principle was recently reaffirmed in Purk v. Federal Press Co., No. 55,214 (D. Fla. July 24, 1980). *See* [1980] PRODUCTS SAFETY & LIAB. REP. (BNA) 607.

Perhaps the most serious challenge presented by the plaintiff in *Dague* was that Public Law No. 141, violated the one subject rule of the Indiana Constitution. Art. IV, § 19 provides: "An act, except an act for the codification, revision or rearrangement of

foreseeable misuse of the product by the claimant or any other person."[134] This approach appears to track with *Konduris* and would appear to adopt whatever scope of unforeseeability is implied by the *Konduris* formulation.

This writer believes the scope of unforeseeability under Indiana strict liability law will prove to be based on a risk-utility analysis in which the seller is imputed to have a full expert's knowledge of the dangerous propensities of his product, but the weighting of the risk and utility factors will ultimately depend on case by case development.

b. Later alteration and modification.—A special variety of product misuse occurs when a third party modifies or alters a product manufactured by the defendant and the plaintiff is injured as a result. This problem is usually associated with workplace accidents where employers are often motivated to make changes to equipment to make it more productive or to modify it to perform new tasks. Inasmuch as the defense of later alteration does not consider the alterer's motive,[135] inadvertant alteration or modification must also be included although the purpose of identifying later alteration as a separate defensive doctrine has been to deal with deliberate third party conduct.

In any event, a determinant in many jurisdictions of the original manufacturer's liability is foreseeability. In *Cornette v. Searjeant Metal Products, Inc.*,[136] Judge Sharp stated in a concurring opinion:

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laws, shall be confined to one (1) subject and matters properly corrected therewith." IND. CONST., art. IV, § 19 (as amended November 8, 1960; November 5, 1974). The product liability statute was passed in 1978 as section 28 of Public Law No. 141 entitled, "An Act to Amend I.C. 33 Concerning Courts and Court Officers and Product Liability." Pub. L. No. 141, 1978 Ind. Acts 1298. The first twenty-seven sections of the statute dealt with matters of court jurisdiction and operation.

The court noted that an act of the legislature carries a presumption of constitutionality and that Indiana courts have in the past broadly interpreted the scope of a single subject which has permitted the grouping of diverse matters under broad subject headings. The *Dague* court found "a reasonable basis for the grouping together of the matters in Public Law 141." The court noted that "almost any desired provision relating to that broad subject might be enacted under that heading." It can be argued, however, that courts and court officers and product liability represent a substantially more diverse combination than any that has been upheld in the past.

Finally, the court ruled that even if two subjects were found in the statute "it can uphold the Indiana Products Liability Act because of the severability provision in that Act." However, if the appellate court finds Public Law No. 141 violative of the Indiana Constitution's one subject provision, on what basis can it choose to save one part of the Act over another?

[134]IND. CODE § 33-1-1.5-4(b)(2) (Supp. 1980).

[135]*See* notes 136-38 *infra* and accompanying text for Indiana common law and statutory "later alteration" defenses.

[136]147 Ind. App. 46, 258 N.E.2d 652 (1970).

"Any change in the product which would be of such nature not reasonably foreseeable to the manufacturer and which contributes to the defect which causes injury is a substantial change and would constitute an affirmative defense to the action."[137] Similarly, section 4(b)(3) of the Indiana Product Liability Act provides: "It is a defense that a cause of the physical harm is a nonforeseeable modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of physical harm."[138]

Section 402A states that liability is to attach to the manufacturer only if the product reaches the ultimate user without substantial change, but comment p to this section is less definite:

> The question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes. No doubt there will be some situations, and some defects, as to which the responsibility will be shifted, and others in which it will not. The existing decisions as yet throw no light upon the questions, and the Institute therefore expresses neither approval nor disapproval of the seller's strict liability in such a case.[139]

In Indiana, it would appear that the seller retains a duty to anticipate later alteration and modification if such substantial changes are foreseeable.

2. Foreseeable Misuse.—At the close of the survey period the Indiana Court of Appeals handed down *Conder v. Hull Lift Truck, Inc.*,[140] which dealt extensively with a manufacturer's duty to foresee product misuse and which clearly sought to reconcile the two Indiana "use" formulations discussed earlier.[141] Conder was severly injured when a lift truck leased to his employer by Hull, a leasing agent, failed to decelerate when Conder removed his foot from the throttle. Conder brought his action under theories of strict liability, negligence, and willful and/or wanton misconduct against Hull, and against Allis-Chalmers, the manufacturer. The jury found for both defendants, and on appeal the judgment for Hull was affirmed on the ground that plaintiff was injured by a superseding intervening cause, but the judgment in favor of Allis-Chalmers was reversed and remanded for a new trial.[142]

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[137] *Id.* at 67, 258 N.E.2d at 665 (White, J., concurring).

[138] IND. CODE § 33-1-1.5-4(b)(3) (Supp. 1980).

[139] RESTATEMENT (SECOND) OF TORTS § 402A, Comment p (1965).

[140] 405 N.E.2d 538 (Ind. Ct. App. 1980).

[141] *See* notes 114-34 *supra* and accompanying text.

[142] 405 N.E.2d at 548; *see* notes 261-66 *infra* and accompanying text.

The plaintiff assigned error to several jury instructions pertaining to Allis-Chalmer's liability. Plaintiff objected to Allis-Chalmer's instruction which told the jury "that the manufacturer is not required to anticipate or foresee that its product will be substantially changed."[143] The appellate court agreed that standing alone such an instruction would be incomplete but was not reversible error when considered together with the plaintiff's instruction which permitted the jury to find liability "*if the manufacturer could reasonably expect of [sic] foresee that the change or alteration might be made and foresees that the change or alteration might render the fork lift truck unsafe.*"[144]

The court did find error in another instruction which stated that the manufacturer was not a guarantor of the quality of its product. While acknowledging that a manufacturer is not an *insurer*, i.e., not responsible for every accident in which its product is involved, the manufacturer does "guarantee that his product is reasonably safe for its intended and foreseeable use."[145]

That the court's linkage of "intended and foreseeable use" was not inadvertant is revealed in its discussion of the defendant's erroneously given instruction dealing with the manufacturer's duty to warn. The jury was told that Allis-Chalmers had no duty "to warn of dangers associated with the misuse of its product."[146] The court noted that the narrow intended use doctrine of *Evans v. General Motors Corp.*,[147] had been overruled by *Huff v. White Motor Corp.*:[148]

> Huff recognized the need for a manufacturer to anticipate the environment in which its product will be used and the reasonably foreseeable risks which its use in the environment entails. *Accord, Shanks v. A.F.E. Industries, Inc., supra.*
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> While *Huff* is a so called "second collision" case, the *Huff* rationale, i.e., the environment in which a product is used must be taken into consideration by the manufacturer, *is wholly apposite to a discussion of product misuse and a manufacturer's duty to warn.*
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> The environmental approach to product use assumes a manufacturer markets a product for an intended use. This is not to say, however, that in considering design alternatives,

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[143]405 N.E.2d at 544.

[144]*Id.* (emphasis added by the court of appeals).

[145]*Id.*

[146]*Id.* at 545.

[147]359 F.2d 822 (7th Cir. 1966).

[148]565 F.2d 104 (7th Cir. 1977).

> including various instruments and warnings, a manufacturer may simply close his eyes to hazards associated with foreseeable misuse of the product. . . . *Perfection Paint & Color Co. v. Konduris* . . . .[149]

There seems no question but that the Indiana Court of Appeals recognized the uncertainties generated by the reservation in *Huff* in respect to the appositeness of misuse analysis to intended use analysis.[150] The *Conder* court moved to close the gap by resolving any differences in the two formulations in favor of the *Konduris* test.[151] In determining the scope of foreseeability which may now be required of a seller, at least for a warning, it may be revealing to examine the facts in *Conder* in more detail. The parties apparently conceded that the leasing agent, Hull, grossly misadjusted the linkage between the forklift governor and the carburetor. The dangerousness of this defective condition was masked by a back-up device, a torsion spring, which when operative, permitted the forklift to decelerate in spite of the governor-carburetor misadjustment. Only after some time had passed following Hull's rental to Conder's employer, did the torsion spring break, thus causing the misadjusted carburetor to fuel the forklift at full throttle.

The improbability of this scenario suggests that a foreseeability requirement is based here on far less than *actual* notice to the manufacturer.[152] To send these facts to a jury would require imputing knowledge of overacceleration due to governor-carburetor linkage misadjustment to the manufacturer from which he should foresee the type of event which occurred. If the magnitude of risk from the hazard outweighed the burden of providing an effective warning then the manufacturer should be liable.[153]

The issue of foreseeability and misuse also arose in *American Optical Co. v. Weidenhamer*.[154] Defendant (AO) assigned error to the trial court's refusal of its tendered instruction which read:

> I instruct you that misuse of a product such as optical lenses consists of a use or manner of use for which they were not designed and intended. It includes a use incurring dangers and hazards which are or should be obvious and apparent to a person of ordinary and reasonable prudence.

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[149]405 N.E.2d at 545-46 (emphasis added).

[150]565 F.2d at 106 n.1. *See* note 124 *supra* and accompanying text.

[151]147 Ind. App. at 119, 258 N.E.2d at 689. *See* note 126 *supra* and accompanying text.

[152]*See* notes 130-32 *supra* and accompanying text.

[153]*See* note 62 *supra* and accompanying text.

[154]404 N.E.2d 606 (Ind. Ct. App. 1980), *petition for transfer filed* Aug. 22, 1980.

> Likewise it includes a use not contemplated for normal handling.[155]

The court of appeals found that the defendant had failed to adequately point out the trial court's error beyond claiming the instruction "correctly states the law of misuse."[156]

The court continued, however, in a lengthy footnote to discuss the absence of a foreseeability requirement from the instruction.[157] The court quoted the misuse definition from the *Konduris* case[158] and the following from a leading authority on product liability, "[n]ot only may misuse or failure to follow directions be foreseeable, but there may be liability for unintended abnormal use of a product if it is foreseeable."[159] The court noted that "[a] number of jurisdictions support this view. Based on the foregoing the trial court could have reasonably concluded the instruction, by omitting foreseeability, was an incorrect statement of the law."[160]

The issue of misuse or later alteration was not raised directly in *Shanks v. A.F.E. Industries*[161] but the foreseeability duty that was applied in that case is similar. The court held that a manufacturer of a component, who knows or should know that his product will be assembled to other components creating a dangerous condition which could have been ameliorated by a feasible safety device installed by him, has a duty to undertake a foreseeability analysis.[162]

3. Foreseeable Misuse Where There is no Defect.—In *Dias v. Daisy-Heddon*,[163] the plaintiff lost an eye when a child who owned a BB gun thought the gun was unloaded and fired it in the direction of the plaintiff. Clearly the defendant BB gun manufacturer could foresee that the normal use environment of its product would include such mishaps. Therefore, the defendant could not interpose a misuse *defense* because only "not reasonably foreseeable" handlings can raise a misuse defense under the rule of *Perfection Paint & Color Co. v. Konduris*.[164] The defendant manufacturer, Daisy, never-

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[155]*Id.* at 624.

[156]*Id.*

[157]*Id.* at 625 n.9.

[158]147 Ind. App. 106, 258 N.E.2d 681 (1970). *See* note 125 *supra* and accompanying text for a quotation of the misuse rule from *Konduris*.

[159]404 N.E.2d at 625 n.9 (quoting L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 8.05[1] (1979)).

[160]404 N.E.2d at 625 n.9 (citations omitted).

[161]403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

[162]"The questions of the feasibility of safety devices and the foreseeability of harm are part of the considerations before the trier to determine . . . whether a product is defective and unreasonably dangerous. . . ." *Id.* at 858.

[163]390 N.E.2d 222 (Ind. Ct. App. 1979).

[164]147 Ind. App. at 119, 258 N.E.2d at 689.

theless prevailed when the plaintiff was either unable to prove the product was defective, or if the particular model was defective, then he failed to prove that the defect was a proximate cause of the injury.[165] It is significant that the jury was instructed that a BB gun is not necessarily an inherently defective product.[166] This case and this instruction illustrate that some products which are fundamentally hazardous are not defective although their intended use may be no more than the providing of "mere" pleasure.

E. Safety Devices and Safeguards

In 1976, the Indiana Court of Appeals in *Gilbert v. Stone City Construction Co.*,[167] held that a "product may fail to meet reasonable safety expectations 'by failing to cope with foreseeable mishaps . . . by lacking feasible safety devices . . . .' "[168] The *Gilbert* holding recognized that mishaps do occur in ordinary use and that a duty exists, based on the strict tort consumer expectation test, to deploy safety devices if they are technologically capable of protecting the user and are not so expensive or cumbersome as to impair the utility of the product. Safety devices are generally thought of as additional components of the product deployed solely to enhance safety.[169] They may be shields; handling devices, such as tongs; sensory extenders, such as mirrors, lamps, or gas detectors; control systems, such as two-hand button systems; or specific warning devices, such as alarms or lights which heighten alertness either before or after the occurrence of a potentially hazardous event.

The safety device issue tends to arise in the workplace setting where potentially destructive products are pervasive and where repetititve tasks virtually ensure that some reduction of workers' vigilance will occur. It seems clear that a positive duty to deploy safety devices is inconsistent with a broad interpretation of the open and obvious danger rule because the need for a safety device is often most acute where the danger from the workplace product is most obvious. A literal interpretation of the open and obvious danger rule would motivate the product manufacturer to omit or even remove the safety devices from its product so as to make the danger more open and more obvious.

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[165]390 N.E.2d at 225.

[166]*Id.* at 227.

[167]357 N.E.2d 738 (Ind. Ct. App. 1976).

[168]*Id.* at 744 (citing Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301, 305 (1967)).

[169]*See* Shanks v. A.F.E. Indus., Inc., 403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980. "The safety device is engrafted upon the machine and immediately affects the user and is therefore different from where merely informative warning or instruction is involved." *Id.* at 858.

In *Meadowlark Farms, Inc. v. Warken*,[170] the lack of a shield over a corn auger was found to be a proximate cause of plaintiff's injuries when he slipped and fell thereon. The failure to deploy the guard was found to be negligence on the part of the defendant Meadowlark which had placed the unguarded auger into the stream of commerce.

In *Bemis Co. v. Rubush*,[171] the plaintiff alleged that the batt packing machine he had operated was defective because the manufacturer had failed to warn of various hazards, *and* that "there existed at the time of the manufacture and sale of the machine, feasible and economic safeguards"[172] which were lacking. The court held that in determining "what an ordinary consumer may contemplate in regard to a product,"[173] the trier of fact could consider several factors including "whether feasible safeguards exist."[174] The open and obvious danger rule would provide but one other factor "in determining whether a product [is] in a defective condition unreasonably dangerous."[175]

The *Bemis* court noted that a two-step hand control was feasible, and would have prevented the accident. The jury was permitted to find that such a device was necessary, and could be considered separately from any actual warnings the manufacturer might have given, or from any warning provided by the obviousness of the danger.[176]

One additional point can be inferred from the *Bemis* court's language. Although the court cited *Gilbert* for the duty to use safety *devices*, the *Bemis* court employed the more general term *"safeguard"* in its formulation.[177] While a safety device is thought of as limited to a separate component, a *safeguard* could be any element or aspect of the design, manufacturing process, warning or instruction system that would enhance the safety threshold of the product.

In *Shanks v. A.F.E. Industries, Inc.*,[178] the distinction between warnings and physical safety devices was dramatically drawn. The court acknowledged that warnings delivered by a workplace product manufacturer, to the servants of the purchaser who receive the product on the purchaser's behalf, would be adequate. Those servants

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[170]376 N.E.2d 122 (Ind. Ct. App. 1978).

[171]401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

[172]*Id.* at 55.

[173]*Id.* at 57.

[174]*Id.*

[175]*Id.*

[176]*Id.*

[177]*Id.*

[178]403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

would then have the duty to disseminate the warnings, notice, and instructions to the ultimate user. In *Shanks*, the purchaser was found to have been fully and adequately warned of all hazards existent at the time of sale. The manufacturer's duty *to warn* was, therefore, discharged.[179]

Nevertheless, the manufacturer was held to have had an additional and separate duty to deploy a device or guard which would protect the ultimate user who may or may not have been warned of the hazard by his employer, the product purchaser. Ironically, the appropriate safeguard identified by the court was a *warning device.* The court distinguished, however, a general warning from a specific reminder such as a light or claxon which would "inform persons in the immediate vicinity in a possible position of peril that something is about to move, something is about to stop, . . . or some instrumentality is in operation or is about to be placed in operation that could cause harm."[180]

In *Conder v. Hull Lift Truck, Inc.*,[181] the court cited a California case, *Balido v. Improved Machinery, Inc.*,[182] in which an employer declined to purchase optional safety equipment after the machine manufacturer had alerted him to newly discovered hazards. *Balido* was cited for the proposition that the employer's refusal to later purchase safety devices would not be a superseding intervening cause of the plaintiff employee's injuries as a matter of law.[183] The reason that the California Court of Appeals held the manufacturer subject to liability after the manufacturer had warned of the hazard was that it had offered to sell the optional safety equipment rather than provide it gratis, i.e., the seller may not have done "everything reasonably within its power to prevent injury."[184]

The issue of optional versus built-in safeguards has previously been before an Indiana court in *Posey v. Clark Equipment Co.*[185] In *Posey*, the court found that a built-in overhead guard for a forklift was unnecessary because it would reduce the ultility of the forklift for unloading semi-trailers inasmuch as the opening of these trailers was too low to admit the forklift with the guard assembled to it. *Posey* illustrated a situation where a potential safeguard existed, but was not feasible.

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[179]*Id.* at 856-57.
[180]*Id.* at 857-58.
[181]405 N.E.2d 538 (Ind. Ct. App. 1980).
[182]Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973).
[183]405 N.E.2d at 542-43.
[184]29 Cal. App. 3d at 649, 105 Cal. Rptr. at 901.
[185]409 F.2d 560 (7th Cir.), *cert. denied*, 396 U.S. 940 (1969).

F. Adequacy of Warnings

Comment j of section 402A provides in part that "[i]n order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use."[186] Under the Indiana cases, the duty to warn the ultimate user of a workplace product may be discharged by delivering the warning to the user's employer or to its servants who receive the product on behalf of the employer.[187] In *American Optical Co. v. Weidenhamer*,[188] the defendant, American Optical (AO), argued that it had established conclusively at trial that a printed warning had been delivered with each pair of safety glasses it had sold to the plaintiff's employer, International Harvester Company. AO claimed the following warning was printed on cardboard tabs attached to the nosepieces of its glasses:

> CAUTION
>
> These Super Armorplate® lenses are impact resistant but are NOT unbreakable. Clean and inspect lenses frequently. Pitted or scratched lenses reduce vision and seriously reduces [sic] protection. Replace immediately. Meets ANSI Z87. 1-1968 363B.[189]

The appellate court ruled that the evidence was conflicting as to whether a warning had in fact been delivered.[190] Although there was testimony by the safety bin attendant that cardboard tabs did accompany all of AO's glasses, he admitted that he had never read what was on them, that he was unaware they contained a warning, and that the tabs were routinely removed prior to fitting a user.[191] The plaintiff, Weidenhamer, who was injured when a lens shattered and a glass fragment entered his eye, claimed he also was unaware of any warning and that he had believed prior to his accident that his glasses were virtually unbreakable.[192]

The court, in affirming a jury verdict for the plaintiff, ruled that even if AO's warning had accompanied its product, a jury could conclude that the warning was inadequate. The court cited *Ortho Pharmaceutical Corp. v. Chapman*,[193] which relied on *Spruill v. Boyle-*

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[186]RESTATEMENT (SECOND) OF TORTS § 402A, Comment j (1965).

[187]*See* Burton v. L. O. Smith Foundry Prods. Co., 529 F.2d 108, 111 (7th Cir. 1976); Shanks v. A.F.E. Indus., Inc., 403 N.E.2d 849, 856-57 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

[188]404 N.E.2d 606 (Ind. Ct. App. 1980), *petition for transfer filed* Aug. 22, 1980.

[189]*Id.* at 616.

[190]*Id.* at 617.

[191]*Id.* at 611.

[192]*Id.*

[193]388 N.E.2d 541 (Ind. Ct. App. 1979).

Midway, Inc.[194] in which it was held that both the form and content of a warning are to be tested.[195] The form should "catch the attention of the reasonably prudent man in the circumstances of its use"[196] and the content "must be of such a nature as to be comprehensible to the average user and to convey a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person."[197]

The *American Optical Co.* court found that the size of type in which the alleged warning was printed, 1/32 inch in height, made the warning inadequate as to form especially when contrasted with other legends printed in substantially larger type which may have expressly warranted that the safety glasses were safe for use. The court also noted that the words " 'Safety Glasses,' 'SURE-GUARD', and 'Your *Surest* Protection' " were displayed prominently on the side of the box in which the glasses were delivered.[198] The court stated that "[t]here is a particular need for an effective warning when the manufacturer has made a representation of safety because, having been assured a product is safe, people are less likely to watch for potential danger."[199]

AO's warning was also found to be wanting with respect to content.[200] The AO registered tradename, "Super Armorplate" was held to be misleading because it implied the lenses "offered the protection of metal armor."[201] The court held that a user could reasonably interpret AO's warning to mean "that the lenses might break if pitted or scratched but were unbreakable absent such infirmities."[202] Because plaintiff had testified that his glasses were not pitted or scratched, a jury could conclude that Weidenhamer might reasonably have believed from AO's warning that he was protected when in fact he was not. The court emphasized that the warning completely failed to prepare the user for the possibility that the lens might "shatter into jagged pieces."[203]

AO argued that the act of the safety bin attendant in removing

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[194]308 F.2d 79 (4th Cir. 1962).

[195]404 N.E.2d at 615.

[196]*Id.* (quoting Ortho Pharmaceutical Corp. v. Chapman, 388 N.E.2d at 552 (quoting Bituminous Cas. Corp. v. Black & Decker Mfg. Co., 518 S.W.2d 868, 872-73 (Tex. Civ. App. 1974))).

[197]404 N.E.2d at 615 (quoting Ortho Pharmaceutical Corp. v. Chapman, 388 N.E.2d at 552 (quoting Bituminous Cas. Corp. v. Black & Decker Mfg. Co., 518 S.W.2d at 873)).

[198]404 N.E.2d at 617.

[199]*Id.* at 615.

[200]*Id.* at 618.

[201]*Id.*

[202]*Id.*

[203]*Id.*

its purported warning prior to fitting the user constituted "substantial change" in the product after its introduction into the stream of commerce.[204] The court of appeals, relying on *Spruill v. Boyle-Midway, Inc.*,[205] ruled that an inadequate warning was equivalent to no warning and thus "a manufacturer or supplier cannot rely upon such a defective warning, and its removal or destruction by a third party before reaching the ultimate consumer is of no consequence."[206]

AO also argued that an instruction tendered by the plaintiff and given by the court was incomplete when it stated that a failure to give directions or warnings required to prevent the product from becoming unreasonably dangerous would render the product defective.[207] AO asserted that the jury should have been informed "that a manufacturer can assume its warning will be read and heeded."[208] Comment j to section 402A provides in part that "[w]here warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."[209] Unfortunately, the court did not respond to the merits of AO's contention because it found no objection to the instruction on this ground in the record or in AO's motion to correct errors and thus ruled that "[i]ts claimed error now raised for the first time on appeal is waived."[210]

When the "read and heed" rule from comment j was discussed by the court in *Nissen Trampoline Co. v. Terre Haute First National Bank*,[211] that court prefaced the word warning with the word "adequate."[212] Although comment j does not consider the adequacy of warnings it seems clear that Indiana courts will give the seller the presumption his warning will be read and heeded only if the warning is found to be adequate. It would have been better if the *American Optical Co.* court, which followed *Spruill* in equating an in-

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[204] *Id.*

[205] 308 F.2d 79 (4th Cir. 1962).

[206] 404 N.E.2d at 619.

[207] *Id.* at 620.

[208] *Id.*

[209] RESTATEMENT (SECOND) OF TORTS § 402A, Comment j (1965).

[210] 404 N.E.2d at 620-21.

[211] 332 N.E.2d 820 (Ind. Ct. App. 1975), *rev'd on other grounds*, 265 Ind. 457, 358 N.E.2d 974 (1976).

[212] 332 N.E.2d at 826. The *Nissen Trampoline Co.* court pointed out that a purpose for the "read and heed" rule was to enable the plaintiff to meet his burden of proving cause in fact. "A more reasonable approach . . . is that the law should supply the presumption that an *adequate* warning would have been read and heeded, thereby minimizing the obvious problems of proof of causation." *Id.* (emphasis added).

adequate warning with no warning when discussing the third party intervention issue, had also made this point explicit with respect to the "read and heed" rule.[213]

G. Causation

1. Cause in Fact.—Cause in fact, or "but-for" causation, was a hotly contested issue in the criminal, reckless homicide trial of *State*

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[213]In *Weidenhamer* it appeared that the court would have to deal with the issue of alternative liability. The trial court had permitted the jury to find against two manufacturers of safety glass lenses, although only one could have supplied the defective lens which injured the plaintiff. The issue appeared similar to the one raised in Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948), in which two hunters had fired in the direction of the plaintiff. Only one shot caused injury but there was no way to identify which of the hunters was responsible. The *Summers* court found both defendants jointly and severably liable to the plaintiff. In *Weidenhamer*, however, the court of appeals ruled there was sufficient evidence from the plaintiff's testimony to identify the manufacturer of the lenses which the plaintiff was wearing at the time of the accident and so it reversed as to the other defendant (U.S. Safety). 404 N.E.2d at 613.

The *Summers v. Tice* problem with respect to product liability is proving to be a thorny one in other jurisdictions. In Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), one of many cases "seeking to hold drug manufacturers liable for injuries resulting from DES," *id.* at 597, 607 P.2d at 927, 163 Cal. Rptr. at 135, a drug prescribed to prevent miscarriages, the California Supreme Court permitted recovery to a child under a "modification of the *Summers* rule." *Id.* at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. If the child could join as defendants a relative "handful" of manufacturers of the drug whose production accounted for a substantial share of DES production (allegedly here 90%) so that there would be "only a 10 percent likelihood that the offending producer would escape liability," *id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145, then the "injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished." *Id.*

The *Sindell* court noted that in most of the DES cases the drug companies have prevailed because claimants have failed to identify the manufacturers of the DES prescribed to their mothers, *id.* at 597, 607 P.2d at 927-28, 163 Cal. Rptr. at 135-36, but the court did discuss in addition to the alternative liability theory (the *Summers* rule) and the market share theory upon which the *Sindell* court relied, two other theories which have led to liability for manufacturers who could not be specifically identified as actual suppliers of defective products causing injury. *Id.* at 603-10, 607 P.2d at 931-35, 163 Cal. Rptr. at 139-43. The gravamen of the "concert of action" principle argued by the plaintiff in *Sindell* "is that the defendants failed to adequately test the drug or to give sufficient warning of its dangers and that they relied upon the tests performed by one another and took advantage of each others' promotional and marketing techniques." *Id.* at 605, 607 P.2d at 932, 163 Cal. Rptr. at 140. The "enterprise liability" theory "suggested in Hall v. E.I. Du Pont de Nemours & Co., Inc., 345 F. Supp. 353 (E.D.N.Y. 1972)" was grounded on the widespread industry practice of failing to provide a warning which "created an unreasonable risk of harm." 26 Cal. 3d at 607, 607 P.2d at 934, 163 Cal. Rptr. at 141-42. It is likely that Indiana courts will soon be required to deal with this issue in the context of drugs, asbestos, or other products which are used or consumed, their origins then become lost or forgotten, and serious after-effects become manifest only much later.

v. Ford Motor Co.[214] Causation principles in criminal cases are similar to tort case principles with the exception that the standard of proof required in the former is "beyond a reasonable doubt"[215] as opposed to the "preponderance of the evidence"[216] standard required in the latter. In either type of action, to establish the required causation element, the plaintiff or state must first prove that but for the defendant's act, there would have been no injury.[217]

In the *Ford Motor Co.* (Pinto) case, evidence was introduced that the van which struck the deceased's car was traveling at fifty to fifty-five miles per hour at the moment of impact. The state alleged that Ford had designed a defective fuel system and had recklessly failed to warn decedents that the design was vulnerable to heavy fuel leakage in the event of rear end collisions in excess of thirty miles per hour. It was generally acknowledged, however, that all small cars would be equally vulnerable to spillage at impact speeds above forty to forty-five miles per hour. Ford never conceded that its 1973 Pinto was defectively designed, but it argued that even if that model were unusually vulnerable to low speed collisions, this particular accident occurred at higher speeds, and therefore, any alleged defect in the design could not have been a cause in fact of

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[214]No. 11-431 (Pulaski County Cir. Ct. (Ind.) Mar. 13, 1980). This case was not appealed from the trial level. For the purpose of this report, the writer relies on L. STROBEL, RECKLESS HOMICIDE? (1980) and the daily reporting of the events of the trial in the various news media during the first few months of 1980. The Indiana Ford Pinto trial was reportedly the first instance in which a corporate product manufacturer was prosecuted under a state's reckless homicide statute for allegedly failing to warn decedents of a dangerous defect in the design of the product. IND. CODE § 35-42-1-5 (Supp. 1980) provides in part: "A person who recklessly kills another human being commits reckless homicide, a Class C felony." IND. CODE § 35-41-2-2(c) (Supp. 1980) defines "recklessly" as follows: "A person engages in conduct 'recklessly' if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct." IND. CODE § 35-41-2-3(a) (Supp. 1980) provides: "A corporation, partnership, or unincorporated association may be prosecuted for any offense; it may be convicted of an offense only if it is proved that the offense was committed by its agent acting within the scope of his authority." For a critique of the appropriateness of applying these statutes to the act of motor vehicle design, see Epstein, *Is Pinto a Criminal?*, REGULATION (A.E.I. J. GOV'T AND SOC'Y), March/April 1980, at 15.

[215]*See, e.g.*, Stout v. State, 90 Ind. 1 (1883); Jarrell v. State, 58 Ind. 293 (1877).

[216]*See, e.g.*, Reynolds v. State, 115 Ind. 421, 17 N.E. 909 (1888); Indianapolis Light & Heat Co. v. Dolby, 47 Ind. App. 406, 92 N.E. 739 (1910).

[217]*See* note 226 *infra* and accompanying text. The language quoted there by the court in Shanks v. A.F.E. Indus., 403 N.E.2d 849, 859 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980, from Johnson v. Bender, 369 N.E.2d 936, 939 (Ind. Ct. App. 1977) states that a cause is something "'without which the result would not have occurred.'" The *Shanks* court then quoted Ortho Pharmaceutical Corp. v. Chapman, 388 N.E.2d 541, 555 (Ind. Ct. App. 1979) in which this language was correctly described as the "'but-for' test." 403 N.E.2d at 859.

the decedents' enhanced injuries and deaths by incineration; and thus, the but for causation was a missing element from the prosecution's case.

The prosecution sought to establish its prima facie case by introducing testimony that the decedent's Pinto was moving at more than twenty miles per hour and that the van was moving slower than fifty miles per hour—thus, the closing speed of the two vehicles was approximately thirty miles per hour and the fuel system vulnerability, the alleged product defect, would therefore be a cause in fact of the enhanced injuries. The defense disputed the prosecution's testimony and the conflicting evidence was permitted to go to the jury, which acquitted Ford. It is interesting that interviews with the jury after trial indicated that the issue of closing speed was never resolved by the jury.[218] Ford's acquittal was justified primarily by an evaluation of its *conduct* before the accident. Ford's demonstrated good faith efforts to expedite the Pinto recall program was probably decisive. A number of the jurors felt Ford's design calculus did not produce a safe enough small car; but significantly, at least some of the jurors recognized that product design required trade-offs and safety was a factor which could be reduced in favor of light weight to enhance affordability and fuel economy.[219]

Cause in fact was also raised as an issue in *Meadowlark Farms, Inc. v. Warken.*[220] The defendant moved for judgment on the evidence on the ground that his act in leaving a corn auger unguarded was not a cause of Warken's injury. Because there was evidence that, but for the lack of a guard, no harm would have occurred, the issue was permitted to go to the jury.[221]

2. Proximate Cause.—a. In general.—Because the chain of but-for causation for any event can be traced back in time to the creation of the universe, the limiting concept of proximate cause is applied by courts to cut off liability for actions at a point which society deems appropriate.[222] This point has been difficult to define, and jurisdictions vary greatly in their formulations and jury instructions with respect to proximate cause.[223] The Indiana formulation as

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[218]The evidential issue of closing speed was discussed and referred to throughout Mr. Strobel's book. L. STROBEL, *supra* note 214. The defendant's attempt to prove a high closing speed was referred to by trial participants and the press as Ford's effort to "*stop that Pinto.*" *Id.* at 134.

[219]*See* L. STROBEL, *supra* note 214, at 268.

[220]376 N.E.2d 122 (Ind. Ct. App. 1978).

[221]*Id.* at 130. "[I]n the absence of such negligence the injurious result could not have occurred." *Id.*

[222]*See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 244 (4th ed. 1971).

[223]*Id.* at 246-49.

set out in *Ortho Pharmaceutical Corp. v. Chapman*[224] was quoted during the survey period in *Shanks v. A.F.E. Industries*:[225]

> Proximate cause is commonly defined as 'that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which the result would not have occurred.' *Johnson v. Bender*, (1977) Ind. App., 369 N.E.2d 936, 939. This latter language describes what is known as the 'but-for' test. A fundamental element of proximate cause is that the injury or consequence of the wrongful act be of a class reasonably foreseeable at the time of that act. *Elder v. Fisher*, (1966) 247 Ind. 598, 217 N.E.2d 847; *Meadowlark Farms, Inc. v. Warken, supra* [(1978) Ind. App., 376 N.E.2d 122]. The defendant's act need not be the sole proximate cause; many causes may influence a result. *Meadowlark Farms, Inc. v. Warken, supra*, 376 N.E.2d at 129. The question is whether 'the original wrong was one of the proximate rather than remote causes.' *Dreibelbis v. Bennett*, (1974) 162 Ind. App. 414, 319 N.E.2d 634, 638. Thus, 'the ultimate test of legal proximate causation is the reasonable foreseeability. The assertion of an intervening, superceding [*sic*] cause fails to alter this test.' *Id.* Rather, [w]here harmful consequences are brought about by intervening independent forces the operation of which might have been reasonably foreseen, then the chain of causation extending from the original wrongful act to the injury is not broken by the intervening and independent forces and the original wrongful act is treated as a proximate cause. *New York Central R. Co. v. Cavinder*, (1965) 141 Ind. App. 42, 211 N.E.2d 502, 508. Proximate cause is generally a question for the trier of fact.[226]

As can be noted from this formulation, causation can be viewed from the perspective of the original actor and also from the perspective of other actors whose actions also proximately cause the injury. Whether the original actor will be relieved of liability under this formulation will rest on the reasonable foreseeability of the intervening acts. Also to be noted is that this definition includes the but-for test and that proximate cause is generally a jury question.

Commentators have argued that foreseeability is a duty question and that proximate cause should only test whether the injurious

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[224]388 N.E.2d 541 (Ind. Ct. App. 1979).

[225]403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

[226]*Id.* at 859.

event was highly attenuated from the causative act or was separated by a series of highly extraordinary intervening events as judged through an analysis blessed with full hindsight knowledge of the facts.[227] Indiana courts, however, require, in addition, what appears to be a finding of duty foreseeability as a prerequisite to a finding of proximate cause. Therefore, negligence or strict tort product cases in Indiana in which the product is found undefective can be disposed of under a no duty (or no defect) element, or a no proximate cause element, or both.[228]

b. Intervening cause.—In *Shanks v. A.F.E. Industries, Inc.*,[229] the manufacturer of a grain dryer argued that his product was not the proximate cause of plaintiff's injury. The grain dryer had been assembled by the purchaser to several other independent pieces of equipment to create an automated complex. The plaintiff, an employee of the purchaser, was repairing an elevator connected to the grain dryer, when the elevator became activated. The activation, although unexpected by the plaintiff, was a regular and planned result of the connective circuitry specified by the employer and installed by third parties.

The court held that a jury might find that the defendant manufacturer of the grain dryer could reasonably foresee that its component would be connected to other components with an intermittent cycling pattern as a predictable design element.[230] Although the employer's negligence in failing to properly warn his employee of the hazard was *a* proximate cause, the manufacturer's failure to foresee the type of harm which in fact occurred, and its failure to provide a *built-in* signaling device was sufficient to present the proximate cause issue to the jury with respect to the liability of the defendant grain dryer manufacturer.[231]

In *Meadowlark Farms, Inc. v. Warken*,[232] the defendant also asserted that the plaintiff's action in falling upon an unguarded corn auger was "an independent responsible agency which interrupted the line of causation and extinguished its liability."[233] The court

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[227]RESTATEMENT (SECOND) OF TORTS § 435(2) (1965) provides: "The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm."

[228]For a discussion of proximate cause in a strict liability context (although not a § 402A product liability context), see Galbreath v. Eng'r Constr. Corp., 149 Ind. App. 347, 273 N.E.2d 121 (1971).

[229]403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

[230]*Id.* at 856.

[231]*Id.* at 859.

[232]376 N.E.2d 122 (Ind. Ct. App. 1978).

[233]*Id.* at 129.

quoted from *Dreibelbis v. Bennett*,[234] which cited several authorities to the effect that "the ultimate test of legal proximate causation is the reasonable foreseeability" and that "a reasonable conclusion [was] that the original wrong was one of the proximate rather than remote causes."[235] The *Meadowlark* court found "[a] continuous and foreseeable connection existed between the dangerous condition of the equipment and the injury."[236] Warken's slip and fall was an additional, concurrent, reasonably foreseeable cause, but was not superseding.[237] Note, the issue here stated was causation and not contributory negligence.

In *Bemis Co. v. Rubush*,[238] the trial court incorrectly linked a proximate cause instruction with a defectiveness instruction. As worded, the jury, in order to find for the defendant, would have to find that the product was defective and also that the plaintiff's negligence was the sole proximate cause of his injury. The appellate court made clear that a finding that plaintiff's negligent act was the sole cause of his injury would be sufficient in itself to defeat his action. The court found no error in the instruction that defectiveness would also have to be found, because the court found that later instructions corrected any possible misapprehension.[239] It should be noted, however, that although contributory negligence is not a defense to a strict tort claim, where the plaintiff's negligence is the *sole* proximate cause of the injury, the defendant will have refuted the plaintiff's prima facie case. In *Bemis*, the appellate court affirmed a jury verdict which found the product's design and/or warning defect at least *a* proximate cause of the plaintiff's injuries.

A superseding intervening cause sufficient to break the chain of causation from the alleged defect in the defendant's product to the plaintiff's injuries was found by the appellate court in *Peck v. Ford Motor Co.*[240] The plaintiff received a jury verdict for injuries sustained when his truck collided with another truck manufactured by the defendant Ford and owned by another of the defendants, Hunter. The Ford truck had been left parked on the highway by Hunter's driver as a result of an alleged defect in the gear box which disabled it. The appellate court assumed, for argument, that the Ford truck was in fact defective and that the defect had disabled it. Cause in fact was therefore established and the sole issue

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[234]162 Ind. App. 414, 319 N.E.2d 634 (1974).

[235]376 N.E.2d at 129.

[236]*Id.*

[237]This was determined by the jury at trial.

[238]401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

[239]*Id.* at 60.

[240]603 F.2d 1240 (7th Cir. 1979).

remaining to be decided was proximate cause. The plaintiff conceded on appeal that "foreseeability is an essential element of proximate causation,"[241] but he argued that the events which occurred were foreseeable by Ford.

The court first noted that the plaintiff was a bystander and that Indiana's extension of protection to bystanders under strict liability was quite recent and that the court of appeals decision in *Chrysler v. Alumbaugh*,[242] had "emphasized that the extension of liability to bystanders is circumscribed by a requirement of reasonable foreseeability."[243] In the *Alumbaugh* case the court had applied a proximity limitation test to the scope of liability with respect to bystanders. It was found to be reasonably foreseeable that "occupants of other vehicles *being operated on the highway in close proximity to the Chrysler vehicle* were subject to harm from the defect."[244] The *Peck* court, in analogizing its facts to those in the *Alumbaugh* case, converted proximity in space to proximity in time supported by negligence rules which would find a causative chain broken after the "tort had 'spent its force.'"[245] Because more than three hours had passed from the time the Ford truck had come to rest until the plaintiff's truck collided with it, the court ruled that the duty to prevent harm "had passed to the driver [plaintiff] who was clearly in the best position to prevent further harm."[246]

In addition, the court noted twelve fortuitous events occurring from the time of disablement to the time of accident which the court characterized as an "extremely unusual combination of circumstances."[247] The court stated "a lesser combination could fairly be said to preclude foreseeability on an objectively reasonable basis."[248]

The *Peck* case illustrates the two step nature of the Indiana foreseeability test in respect to proximate cause. First, it is necessary to determine whether the cause under consideration was "in natural and continuous sequence."[249] If it is not, then it is not objectively foreseeable. As the *Peck* court pointed out, however, the foreseeability principle does "not mean that the precise hazard or the exact consequences which were encountered should have been foreseen."[250] Nevertheless, some events are too attenuated or too sepa-

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[241] *Id.* at 1243.

[242] 342 N.E.2d 908 (Ind. Ct. App. 1976).

[243] 603 F.2d at 1244.

[244] *Id.* (quoting Chrysler v. Alumbaugh, 342 N.E.2d 908, 917 (Ind. Ct. App. 1976)).

[245] 603 F.2d at 1244 (quoting Whitehead v. Republic Gear Co., 102 F.2d 84, 85 (9th Cir. 1939)).

[246] 603 F.2d at 1244-45.

[247] *Id.* at 1247.

[248] *Id.* at 1247 n.4.

[249] *See* note 226 *supra* and accompanying text.

[250] 603 F.2d at 1246.

rated by extraordinary intervening events to involve a duty of reasonable foreseeability. If the harmful event survives this attenuation or extraordinary intervening event analysis, it must then be examined under duty foreseeability principles[251] in which magnitude of risk is balanced against burden of prevention.[252] In *Peck*, the defect in the gearbox was held by the appellate court, as a matter of law, not to be in natural and continuous sequence with plaintiff's injuries and that ended the inquiry.

The *Peck* court applied another doctrine from negligence law which has been used before in this type of accident. This doctrine states that if the defendant's act "merely created a 'condition' by which the subsequent injury was made possible, there is no proximate cause relationship between the negligence and the injury."[253] When a car creates an accident on the highway and the vehicles come to rest, the original defendant's car will not be the proximate cause of subsequent collisions as a matter of law because he has merely created a condition. If, however, the defendant breaches subsequent duties as, for example, failure to post proper warnings, he can be liable for the later acts or omissions.[254]

This doctrine of merely creating a condition was questioned during the survey period in *Mansfield v. Shippers Dispatch, Inc.*[255] *Mansfield* was not a products case but the facts were strikingly similar to those of *Peck*. Defendant's employee truck driver, noticing blue smoke coming from his exhaust, was alleged to have parked his truck partially on the highway. Plaintiff's decedent, who was driving the other way, was killed when a maneuver by another vehicle seeking to avoid the parked truck led to a loss of control of still another car, thus resulting in the fatal crash.

The trial court instructed the jury that if parking the "truck on the berm of the highway created a mere condition and that the collision . . . thereafter resulted from the interaction of other persons . . . the act [of the defendant] in stopping . . . would not be a proximate cause of the collision . . . ."[256] The appellate court admitted that the "created condition" doctrine might be useful for an appellate court to explain how it reached a conclusion.[257] However, the court found that it was not appropriate language for a jury instruction because it implied that there may be a difference in liability between active

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[251]*See* notes 227-28 *supra* and accompanying text.

[252]*See* text following note 134 *supra*.

[253]603 F.2d at 1245.

[254]In *Peck*, the court held such duties probably existed but they were the duties of Hunter, the truck owner, and its driver, not the duties of Ford. *Id.*

[255]399 N.E.2d 423 (Ind. Ct. App. 1980).

[256]*Id.* at 425.

[257]*Id.*

and passive negligence, and Indiana courts have expressly rejected any such distinction.[258]

The court reiterated that the test of proximate cause was reasonable foreseeability and then seemed to remove all vitality from the "mere condition" doctrine:

> Thus, the question of the legal effect of the intervening agency upon causation should not have been determined upon the basis of whether Rafferty's actions merely created a condition. Instead, *if* his actions in stopping the semi, as he did, were negligent, then the question of proximate cause depended upon whether the independent agency might have been reasonably expected under the circumstances to intervene in such a way as to likely produce an injury similar to the one that occurred.[2] [259]

The footnote indicated presents a valuable perspective on the interaction of duty, proximate cause, and foreseeability.[260]

A defendant's verdict which found a superseding intervening cause was affirmed in part and reversed in part in *Conder v. Hull Lift Truck, Inc.*[261] Defendant Hull was found to have grossly misadjusted a carburetor-governor linkage on a forklift and then leased the forklift to Conder's employer. The hazard from the maladjustment did not manifest itself until a torsion spring broke permitting the forklift to overaccelerate. A supervisor for the plaintiff's employer became aware of the hazard but neglected to take the forklift out of service because of the pressure of production schedules, and the plaintiff, who was unaware of any danger, operated the forklift and was severely injured when it overturned.

Inasmuch as there appeared no question but that the misadjustment did occur and was performed by Hull, the leasing agent, the misadjustment did make the forklift defective and was a cause in fact of Conder's injuries; the only issue as to Hull's liability was that of proximate cause. The verdict for Hull meant that the jury found that Hull could not have reasonably foreseen the supervisor's acts in not taking the forklift out of service, in not calling Hull to report the problem, and in not warning the plaintiff of the hazard. The ap-

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[258] *Id.*

[259] *Id.* at 426.

[260] *Id.* at 426 n.2. The court cites Prosser to point out that "the issue of intervening causes should more appropriately be considered in terms of duty." *Id.* (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS 270-88 (4th ed. 1971)). The court agrees but notes that Indiana follows the majority foreseeability rule with respect to proximate cause. *Id.*

[261] 405 N.E.2d 538 (Ind. Ct. App. 1980).

pellate court's affirmation of the verdict for Hull meant that reasonable jurors could reach that conclusion.

Although the supervisor's action was a superseding unforeseeable intervening cause as to Hull, the leasing agent, it apparently may not have been as to Allis-Chalmers, the forklift manufacturer. The appellate court reversed the defendant's verdict for Allis-Chalmers. Reversing as to Allis-Chalmers alone might suggest that the court found that the manufacturer was a better foreseer of the lessee's negligence than the leasing agent which dealt directly with and knew the customer. Maybe that is so, yet under strict tort, all sellers (or lessors) in the chain of distribution are presumed to have an expert's knowledge, insofar as it is knowable, as to the dangerous propensities of the products they introduce into the stream of commerce.[262] With equal imputed knowledge, one would suppose such sellers would also be equally positioned to predict the dangerous foreseeable events that the ultimate product user is likely to encounter.

There are courts which distinguish foreseeability of use from foreseeability of harm,[263] but this formula says nothing more than that knowledge of harmful propensities is to be imputed to the seller while uses and misuses are subject to foreseeability principles.[264] However, there is nothing in this analysis which suggests that one seller in the chain of distribution may be a better foreseer than another—actually, with knowledge of harm imputed, the opposite conclusion flows from the formula.

In a new trial, under the court of appeals ruling in *Conder*, the jury will be instructed to determine whether Hull's misadjustment was foreseeable to Allis-Chalmers. If it was, the forklift could be found defective on the ground that the manufacturer failed to warn of the hazard. The new jury will also be instructed to determine whether the negligence of the remote lessee in failing to remove the forklift from service was unforeseeable and therefore a superseding cause of plaintiff's injuries. The jury will be able to find for either party based on the jury's view of what acts are reasonably foreseeable.

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[262]*See* note 62 *supra* and accompanying text.

[263]*See* Newman v. Utility Trailer & Equip. Co., 278 Or. 395, 397-401, 564 P.2d 674, 675-77 (1977).

[264]Foreseeability principles applied to use would require a manufacturer or other seller with imputed knowledge of his product's propensity to harm, to subject all the possible product uses which are not so highly extraordinary that a reasonable man would exclude them from consideration, to a risk-utility analysis to determine which of those remaining uses requires a change in the product because a hazard designed or built into the product outweighs the burden of protecting against it.

Under Indiana law, defectiveness is a jury question,[265] and failure to warn, or otherwise anticipate product misuse, may constitute defectiveness.[266] If Hull and Allis-Chalmers had originally been tried separately, with the Allis-Chalmers jury having been correctly instructed, and the Hull jury had found for the defendant solely on the ground of superseding intervening cause, and the Allis-Chalmers jury had found for the plaintiff, we would have little difficulty in accepting what would have appeared to have been inconsistencies of the two verdicts. However, because the parties were joined for sake of judicial economy, there seems no compelling reason to require greater harmony. What makes *Conder* a more difficult case is the fact that the jury found for Allis-Chalmers, and it may have done so on the same ground that it found for Hull, in which case Allis-Chalmers' failure to warn Hull of the misadjustment hazard would not have been a proximate cause of Conder's injuries and the instruction error would therefore have been harmless. The case presents an argument for special verdicts where there are multiple defendants.

The criminal case of *State v. Ford Motor Co.*[267] reminds us that one proximate cause doctrine is no longer with us in Indiana. Prior to the decision in *Huff v. White Motor Corp.*,[268] an act by plaintiff or by a third party which caused a motor vehicle collision would provide a superseding intervening cause between any alleged defect in the vehicle which made it less crashworthy and a plaintiff's *enhanced* injuries. Before *Huff*, the doctrine of *Evans v. General Motors, Inc.*[269] was applied in this state which, although couched in duty terms, also went to proximate cause.[270] It is of some interest to speculate whether a collision prior to *Huff* could have supported a criminal prosecution on the proximate cause issue assuming that the lack of enabling legislation permitting criminal suits of this nature against corporations was not a problem.[271] While cause in fact was a lively issue in the Pinto trial, the act of the third party van driver who caused the collision, although negligent, did not rise to the level of *superseding* cause, as a matter of law, as it might have prior to *Huff*.

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[265]Dias v. Daisy-Heddon, 390 N.E.2d 222, 225 (Ind. Ct. App. 1979); Gilbert v. Stone City Constr. Co., 357 N.E.2d 738, 744 (Ind. Ct. App. 1976).

[266]Burton v. L.O. Smith Foundry Prod. Co., 529 F.2d 108, 111 (7th Cir. 1976); Shanks v. A.F.E. Indus., Inc., 403 N.E.2d at 856-57.

[267]No. 11-431 (Pulaski County Cir. Ct. (Ind.) Mar. 13, 1980).

[268]565 F.2d 104 (7th Cir. 1977).

[269]359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966).

[270]"A manufacturer is not under a duty to make his automobile accident-proof or fool-proof; nor must he render the vehicle 'more' safe where the danger . . . is obvious to all." *Id.* at 824.

[271]*See* IND. CODE § 35-41-2-3(a) (Supp. 1980), *reprinted at* note 214 *supra*.

H. Stream of Commerce: Privity

1. "Unmarketed" and "Unmarketable" Products.—Section 402A of the Restatement (Second) of Torts describes the special liability of a seller of products to a user or consumer.[272] Since that section was promulgated, the scope of transactions to be included under it has been steadily extended in Indiana and elsewhere. The class of users and consumers has been expanded to include bystanders.[273] Further, the section has been applied to lessors;[274] and even a gratuitous transaction when done for a commercial purpose has been covered in Indiana.[275]

In *Petroski v. Northern Indiana Public Service Co.*,[276] the Indiana Court of Appeals ruled that electricity was a product,[277] the sale of which could potentially subject the seller to strict tort liability. The *Petroski* court held, however, that high voltage transmission lines were not analogous to bottles and cans and were therefore not a part of the end product.[278] The lines were held to be under the exclusive control of the seller and so was the high voltage electricity passing through those lines on the way to the final step-down from 7200 volts to 110 volts which must occur before the electricity can enter into the household system.[279]

In *Hedges v. Public Service Co. of Indiana*,[280] the plaintiffs inadvertently intercepted, with an aluminum ladder, high voltage electricity running through an uninsulated transmission line located on their property. The court ruled that "[t]he Hedges encountered electrical energy in an unmarketable and unmarketed state."[281] The court noted "that although a literal 'sale' of the product is not required, the product must be placed into the stream of commerce before § 402A strict liability can attach."[282] The court found "that the electricity was not in the stream of commerce . . . ."[283] The court contrasted the situation in the case before it with that of *Helvey v.*

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[272]Section 402A is quoted in note 44 *supra*.

[273]*See, e.g.*, Gilbert v. Stone City Constr. Co., 357 N.E.2d 738, 742 (Ind. Ct. App. 1976); Chrysler Corp. v. Alumbaugh, 168 Ind. App. 363, 374-75, 342 N.E.2d 908, 916-17 (1976).

[274]357 N.E.2d at 742.

[275]Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970).

[276]354 N.E.2d 736 (Ind. Ct. App. 1976).

[277]*Id.* at 747.

[278]*Id.*

[279]*Id.*

[280]396 N.E.2d 933 (Ind. Ct. App. 1979).

[281]*Id.* at 935.

[282]*Id.*

[283]*Id.*

Wabash County REMC,[284] where the damage from a voltage line surge allegedly occurred *after* the electricity had been stepped down *and* had passed through the house's electric meter.[285]

In addition to the strict liability count, the plaintiff in *Hedges* alleged that the defendant electric company had breached its implied warranty of merchantability. Again, electricity was ruled to be a "good" covered by Article Two of the Uniform Commercial Code (U.C.C.).[286] The court also ruled, however, that:

> The high-voltage electricity with which the Hedges came into contact was not the good PSI was intending to sell or the Hedges were intending to buy. While the delivery of 135 volts of electricity under the circumstances in *Helvey* can be considered the sale of a defective good, the tragic escape of 7200 volts . . . is not a transaction in goods intended to be covered by the Uniform Commercial Code.[287]

The *Hedges* court did not state whether its determination was because the high voltage electricity was "unmarketed" or because it was "unmarketable," but the question is significant. If the electricity had been transmitted from its source at 110 volts through insulated lines, would there then have been a U.C.C. transaction subject to warranty liability for consequential damage? The contract for supplying electricity to the Hedges by PSI had presumably been formed earlier between the parties and the electricity in the line strung above the Hedges property probably could be identified to the contract. If a product has been sold (i.e., a contract of sale has been formed) and the product is completely manufactured, and is in the process of delivery, but is defective, and the defect causes injury, should the seller be liable for breach of warranty? It seems clear that the seller should not be liable if the product requires further processing or if a scheduled final inspection before releasing the product might reveal the defect to seller. But, if no further processing or stepping down of voltage need be accomplished prior to release, and if a final inspection by the seller would not correct a defect because it was, for example, a design defect, then should not liability accrue to the seller when the completed product is foreseeably capable of injuring a party who otherwise would be in the class of persons protected by the Code?

The issue arose once again, during the survey period, in *Lukowski v. Vecta Educational Corp*.[288] Plaintiff's decedent was injured

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[284]151 Ind. App. 176, 278 N.E.2d 608 (1972).

[285]396 N.E.2d at 936.

[286]*Id.*

[287]*Id.*

[288]401 N.E.2d 781 (Ind. Ct. App. 1980).

when he fell from a bleacher's balcony which lacked a back railing. The defendant, bleacher manufacturer, asserted it could not be liable under section 402A because it had not completed the fabrication of the product. "Rather it established that the school elected to use the product in a partially finished condition without the approval of Vecta and before Vecta 'delivered' it."[289] Again, the appellate court did not distinguish the ground on which it held there was no liability to the manufacturer. Was it the "partially finished condition" or was it the fact that the product was not "delivered"—or both?

Consistent with the concept that a sale may not be necessary to impress liability on one who introduces a product into the stream of commerce is the notion that the time of entry into the stream should be recognized as that moment when unacceptable risks of harm are created by the introducer. If the product is manufactured to the point where any later processing and inspection will not correct or reveal a dangerous defect and subsequent pre-delivery use is reasonably foreseeable to the seller, it would appear reasonable to impress liability on the seller if in fact the product is so used and plaintiff is injured, even though there may not have been an "official" delivery.

2. Components v. Assemblies.—In the early years of strict tort for product sellers, notions of privity insulated component manufacturers from liability.[290] Courts were better able to accept strict tort liability for distributors and wholesalers because those parties were generally merely conduits and making them available for suit was usually only a matter of trading their inconvenience for that of the injured plaintiff who presumably was more deserving.[291] Further, allowing the plaintiff to reach the manufacturer directly not only facilitated judicial economy, it shifted pressure from the retailer to the assembler of the defective product whose production function was presumably more responsible for releasing dangerously defective products into the stream of commerce.[292] On the other hand, lawsuits against component manufacturers were perceived as potentially difficult to manage because of proof problems arising out of unforeseeable uses of components and, therefore, permitting such

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[289]*Id.* at 787.

[290]*See, e.g.*, Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476, 164 A.2d 773 (1960); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

[291]*See* Smith v. Fiat-Roosevelt Motors, Inc., 556 F.2d 728, 731-32 (5th Cir. 1977); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969).

[292]Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

suits might lead to undesirable proliferation of litigation.[293] Also, because assemblers had a duty to inspect components, they were originally perceived as the proper repositories of liability for the entire finished product.[294]

In any event, the privity barrier in respect to component manufacturers where no substantial change is made to the component has generally broken down.[295] Often the components manufacturers have the "deepest pockets" and bringing in more parties is often a winning tactic for the plaintiff. In addition the practice has tended, surprisingly, to expedite litigation because it stimulates settlement and reduces the number of later suits for indemnity.

Another reason for allowing the plaintiff to reach the component manufacturer was illustrated in *Shanks v. A.F.E. Industries, Inc.*[296] The defendant was a manufacturer of a grain dryer which later became a component of a grain processing complex designed by the plaintiff's employer. Unless the injured plaintiff could reach the allegedly defective component grain dryer manufacturer, he would have to be content with his worker compensation award inasmuch as Indiana recognizes no dual capacity doctrine.[297] The *Shanks* court

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[293]RESTATEMENT (SECOND) OF TORTS § 402A, Comment q (1965) notes that where there is no change "in the component part itself, . . ." strict liability may be expected "to carry through to the ultimate user or consumer." Because there were few decisions at the time, no official position was taken in the *Restatement.* Comment p deals with the question of substantial change. This comment noted the problem of determining liability when a product is later processed. *See* States S.S. Co. v. Stone Manganese Marine, Ltd., 371 F. Supp. 500 (D.N.J. 1973) (where the court found an issue of fact as to the liability of an aluminum manufacturer after his ingots had been cast into propellers which failed). *But cf.* Parker v. Warren, 503 S.W.2d 938 (Tenn. Ct. App. 1973) (where a seller of lumber who was unaware of the intended use was held not liable after bleachers made with his product collapsed).

[294]12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963). The court stated:

> [F]or the present at least we do not think it necessary so to extend this rule [strict manufacturer liability without privity] as to hold liable the manufacturer . . . of a component part. Adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft.

Id.

[295]*See* City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis. 2d 641, 207 N.W.2d 866 (1973). "[V]irtually all courts have taken the *City of Franklin* approach holding that warranty and strict tort are both applicable (in addition to negligence) to manufacturers of defective components integrated unchanged into final products." W. KEETON, D. OWEN & J. MONTGOMERY, PRODUCTS LIABILITY AND SAFETY 686 (1980).

[296]403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

[297]*See* Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident,* 14 DUQ. L. REV. 349, 357-61 (1976); Note, *Dual Capacity Doctrine: Third-Party Liability of Employer-Manufacturer in Products Liability Litigation,* 12 IND. L. REV. 553 (1979). The dual capacity doctrine would give an employee a right to action

found precedent to permit suit against component manufacturers in *Cornette v. Searjeant Metal Products, Inc.*,[298] where the manufacturer of a component safety device escaped liability only when it was shown that its product had probably been later altered and that the alteration was unforeseeable. The *Shanks* court stated its rule:

> [T]he manufacturer of a component is liable under § 402A for injuries to an ultimate user or consumer for a defect where the defective component renders the product in which the component is incorporated unreasonably dangerous. This rule is subject to the limitation that the manufacturer of the component must contemplate that the component be used in the manner in which it was used.[299]

The court found that the defendant's grain dryer had been used in a foreseeable manner and therefore, liability might attach.[300]

3. Sale of Used Products "As is."—In *Stapinski v. Walsh Construction Co.*,[301] the plaintiff was injured when a part of a drive shaft on a truck owned and operated by Security Fence Co. broke, traveled through the air and struck the plaintiff, Stapinski. Security had purchased the truck from defendant Walsh which had bought the truck new some years earlier. Walsh was not a seller of used trucks so the court held that he could not be liable under section 402A. However, in reversing summary judgment for Walsh, the court found that he could be held negligent under section 388 of the Restatement (Second) of Torts—Chattel Known to be Dangerous for Intended Use.[302] If Walsh, a seller of a used truck, knew, or should have known, of a latent defect which the purchaser would not discover or appreciate upon a reasonable inspection, then Walsh would have a duty to any parties injured as a result of the failure to warn or disclose.[303] The appellate court found as fact that Walsh knew that a grease fitting was missing, and that Security, the purchaser, may not have known of the danger in the absence of a fitting which was originally part of the assembly. The fact issue thus raised was sufficient, the court ruled, to preclude affirmance of summary judgment.[304]

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against his employer, other than under worker compensation, if his employer caused injury to him in a capacity other than that of employer. If, for example, the employer was also the manufacturer of the workplace product that injured the employee, the employee could bring a product liability suit against the employer.

[298]147 Ind. App. 46, 258 N.E.2d 652 (1970).

[299]403 N.E.2d at 856.

[300]*Id.*

[301]383 N.E.2d 473 (Ind. Ct. App. 1978), *rev'd*, 395 N.E.2d 1251 (Ind. 1979).

[302]383 N.E.2d at 476 (citing RESTATEMENT (SECOND) OF TORTS § 388 (1965)) (The court adopted § 388 as the law of Indiana. 383 N.E.2d at 476.).

[303]383 N.E.2d at 476-77.

[304]*Id.* at 477.

The Indiana Supreme Court reversed. Following *Trash v. U-Drive-It Co.*,[305] the court held that the purchaser of a used vehicle sold "as is," without warranties, is a "conscious and responsible agency which could and should have eliminated the hazard."[306] The court stated:

> We neither accept nor reject, as a general proposition, the adoption, as the law of Indiana, of the Restatement (Second) of Torts § 388 (1965) by the Court of Appeals . . . . We simply hold that where a nondealer owner sells a motor vehicle to another "as is," the former owner cannot be held liable for personal injury to a bystander.[307]

It should be recognized that the proximate cause analysis by the supreme court is a type of privity barrier grounded on policy which recognized that "[t]o hold otherwise would unduly burden Walsh Construction and those similarly situated. Judge Hoffman [dissenter below] points out that Walsh was in no position to insure against injury as occurred in this case."[308]

I. Negligence Per Se: Government Standards

In *Martin v. Simplimatic Engineering Corp.*,[309] the worker plaintiff was injured when her hand was caught in an unguarded sprocket which was part of a conveyor assembly manufactured by the defendant. A jury found for defendant under theories of strict liability, implied warranty, and negligence. Plaintiff's appeal assigned error to the trial court's failure to give two of plaintiff's instructions. The first instruction would have required the jury to find defendant negligent if it found defendant's acts in violation of the Indiana Dangerous Employment Act.[310] The appellate court found no error on this ground because the Indiana legislature had repealed the Dangerous Employment Act prior to the time of plaintiff's injury[311] and plaintiff was not found to have a vested right which could have survived the repeal.

The second assigned error was the trial court's refusal to instruct the jury that it could consider: 1) that the plaintiff's employer

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[305]158 Ohio St. 465, 110 N.E.2d 419 (1953).

[306]395 N.E.2d at 1253 (citing 158 Ohio St. at 471, 110 N.E.2d at 422).

[307]395 N.E.2d at 1254.

[308]*Id.*

[309]390 N.E.2d 235 (Ind. Ct. App. 1979).

[310]*Id.* at 236. The Act, previously codified at IND. CODE § 22-11-4-4 (1971), was repealed by Act of Apr. 7, 1971, Pub. L. No. 356, § 2, 1971 Ind. Acts 1444. The current version is codified at IND. CODE §§ 22-8-11.1-1 to -50 (1976 & Supp. 1980).

[311]390 N.E.2d at 236-37.

relied on defendant's expertise in manufacturing the conveyor; and 2) if the employer did so rely, then the jury could consider whether defendant "failed to comply with certain regulations adopted by the Indiana Commissioner of Labor."[312] The relevant regulations were standards describing the proper guarding of sprockets.[313] If the regulations could be held to be either directly or indirectly applicable to acts of workplace product manufacturers, then violation of the regulations could create a presumption of negligence under the doctrine of negligence per se.[314]

The court held, however, that "the Commissioner of Labor, pursuant to Ind. Code 22-1-1-11, is only authorized '. . . to adopt, amend or repeal reasonable rules, applicable to either employers or employees, or both, for the prevention of accidents . . . .'"[315] The court also noted that the "tenor of the statutes is that they apply to employers, places of employment, and employees within the jurisdiction of the Department of Labor . . . ."[316] Inasmuch as defendant was not plaintiff's employer, the regulations were held not applicable to it, no presumption of negligence was created, and "[t]herefore, Simplimatic could not be found negligent *per se* on the theory that they breached *Rules* (22-1-1-11) F1 and F5 (Burns Code Ed.)."[317]

The court also noted that almost identical sprocket-guarding standards had reached the jury through another instruction which recited a similar sprocket guarding standard promulgated by the American National Standard Institute which was in effect at the time of the accident. A violation of the ANSI standard, however, would not create a presumption of negligence inasmuch as it does not have the force of law. The jury was instructed that it could consider defendant's failure to observe the ANSI standard "along *with the rest of the evidence* in deciding the issue of the liability of the Defendant as to its negligence or manufacture of a defective product."[318]

The opinion in the *Martin* case did not disclose whether the jury should be permitted to receive evidence that an Indiana statutory sprocket guarding regulation did exist, even if the regulation were not directly applicable to the defendant. Such evidence could have

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[312]*Id.* at 236.

[313]The regulations are cited and summarized in *Martin. Id.* at 237.

[314]*See* BLACK'S LAW DICTIONARY 933 (5th ed. 1979), which defines "negligence per se" as "[c]onduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance . . . ."

[315]390 N.E.2d at 238.

[316]*Id.*

[317]*Id.* at 239.

[318]*Id.* at 238 (emphasis added).

probative value as to the issues of defectiveness and negligence, but the weight of the evidence would have to be measured against the prejudicial effect that knowledge might have on the jury. That issue arose during the survey period in *Second National Bank v. Sears, Roebuck and Co.*[319]

In *Second National Bank*, the plaintiff bank, acting on behalf of a child, alleged the child was injured as a result of his mother's inhalation of carbon monoxide fumes from a defectively installed furnace vent pipe when she was pregnant with him. A verdict was given for the defendant seller-installer, Sears Roebuck, and plaintiff's representative bank and the mother appealed, assigning error to the trial court's refusal to permit introduction of evidence of the existence of a regulation promulgated by the Administrative Building Council of Indiana which contained a standard describing the proper height of furnace "flues, vents and the like."[320] The trial court denied admission of the regulation because it was a regulatory statute which, under the rule of *Fechtman v. Stover*,[321] could not be extended to "civil liability in the landlord-tenant area."[322] On appeal, the defendant raised an additional ground for its objection to the evidence. The proffered regulation was discovered to have been inapplicable to private dwellings at the time of the alleged injury. The appellate court, while admitting that evidence of the existence of a statutory standard might have some probative value, held that the relevance of the evidence was outweighed by "the counterbalancing factor . . . that such evidence could prejudice or mislead the jury into believing that the administrative rules were applicable to the Williams' residence."[323]

As to plaintiff's proffered instruction, which would have found defendant negligent per se if it had violated the regulation, the court ruled it was properly excluded.[324] In addition, the court noted that in a 1940 case, violation of a Fire Marshall's regulation was held not to be negligence per se.[325] The court likened the statutory authority of the Administrative Building Council to that of the Fire Marshall.[326] The court's dictum suggested that the scope of the

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[319]390 N.E.2d 229 (Ind. Ct. App. 1979).

[320]*Id.* at 230.

[321]139 Ind. App. 166, 199 N.E.2d 354 (1964), *transfer denied*, 247 Ind. 498, 217 N.E.2d 587 (1966).

[322]390 N.E.2d at 231.

[323]*Id.*

[324]The instruction provided in part: "If you find . . . said defendant violated this regulation in the installation of the furnace, such conduct would constitute negligence per se . . . ." *Id.* at 231-32.

[325]*Id.* at 232 (citing Town of Kirklin v. Everman, 217 Ind. 683, 29 N.E.2d 206 (1940)).

[326]390 N.E.2d at 232.

negligence per se doctrine should be narrowly construed in Indiana. In the light of the generally expansive decisions by the Indiana Court of Appeals in *Bemis*,[327] *Shanks*,[328] *Conder*,[329] and *Weidenhamer*,[330] we can expect that at least the evidentiary relevance of government standards, which may not apply directly to defendants, will be assigned increasing probative value in the future.[331]

On the other hand, general safety statutes designed to control the conduct of one class of persons will not be invoked to directly regulate the behavior of persons outside that class. In *Stapinski v. Walsh Construction Co.*,[332] plaintiff sought to have a seller of a used vehicle found liable for violating a statute which prohibited the "operation of an unsafe motor vehicle by those who 'drive or move' on a public highway."[333] The Indiana Supreme Court held the statute inapplicable because the *seller* did not drive or move a vehicle on the highway.[334] Likewise, the seller was not "an owner" who could violate another statute which prohibited an owner from causing or knowingly permitting an unsafe vehicle to be driven on a highway.[335] An owner, held the court, was a "person who holds the legal title of a vehicle" at the time the accident occurred.[336] The Indiana Court of Appeals, below, had taken a similar position: "The duty to make the vehicle safe for use on the highways has been statutorily imposed upon the owner and driver of the vehicle."[337]

The role of government standards promulgated through statutes and regulations is a growing one. Not only is the increasing creation of standards by state and federal agencies providing a legal sword for those injured by products which violate those standards, it may

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[327]401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

[328]403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

[329]405 N.E.2d 538 (Ind. Ct. App. 1980).

[330]404 N.E.2d 606 (Ind. Ct. App. 1980), *petition for transfer filed* Aug. 22, 1980.

[331]In Conder v. Hull Lift Truck, Inc., 405 N.E.2d 538, 542-43 (Ind. Ct. App. 1980), the court cited Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973). In *Balido*, the court discussed a 1949 California industrial safety order. The court said, "Non-compliance with a standard set out in an industrial safety order furnishes probative evidence of deficient design, *even though the order is directed at the user of equipment and not at its manufacturer.*" 29 Cal. App. 3d at 641, 105 Cal. Rptr. at 896 (emphasis added).

[332]395 N.E.2d 1251 (Ind. 1980).

[333]*Id.* at 1254 (citing IND. CODE § 9-4-1-126 (Burns 1973) (current version at *id.* § 9-4-1-126 (1976)).

[334]*Id.*

[335]*Id.* (citing IND. CODE § 9-8-6-2(a) (Burns 1973) (current version at *id.* § 9-8-6-2(a) (Supp. 1980))).

[336]*Id.* (citing IND. CODE § 9-4-1-11(d) (Burns 1973) (current version at *id.* § 9-4-1-11(d) (1976))).

[337]383 N.E.2d 473, 476 (Ind. Ct. App. 1978).

eventually provide a shield for manufacturers of products which are in compliance with government standards but whose products nevertheless cause injury. Manufacturers and insurance industry advocates argue that compliance with government standards should be a defense which would refute defectiveness.[338] Generally, the judicial view has been that government standards should be considered as minimums and if further safety provisions are indicated for a product, there is a duty on the part of the manufacturer to provide them.[339]

The problem of minimum compliance with government standards is illustrated in the case of *State v. Ford Motor Co.*[340] The 1973 Ford Pinto in which three young women were incinerated allegedly complied fully with federal automobile fuel system safety regulations in effect at the time. There were, however, no federal fuel system rear end fuel leakage crash standards in existence at the time[341] because, as with many other products, the proliferation of small cars with varying crash characteristics developed more quickly than legislation or regulations could reasonably follow inasmuch as statutory law requires the development of a legislative consensus.[342]

The need for an ultimate *hindsight* judicial test of defectiveness based upon an actual or imputed reasonableness test must remain a major component of our product safety control system. Business interests which press for adoption of the principle that compliance with government standards should be a complete defense must realize that they are asking for a complete shift of responsibility for safety design standards from the manufacturer to the government. The result may well be a host of safety standards so high that other design factors desired by consumers, such as original affordability and economy of operation, will be given little or no weight. Government agencies charged with safety will have little motivation or flexibility to consider the other, often antagonistic, factors which consumers desire, expect, and need to have built into the products they use in a world of shrinking resources.[343]

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[338]*See* FINAL REPORT, *supra* note 19 at VII-37.

[339]*Id.* at VII-38. "Our Legal Study shows that the overwhelming number of courts that have confronted the issue have rejected a strict compliance with legislative or administrative standards defense." *Id.*

[340]No. 11-431 (Pulaski County Cir. Ct. (Ind.) Mar. 13, 1980).

[341]*See* STROBEL, *supra* note 214, at 83. "When the Pinto went on sale, the federal government had no standards concerning how safe a car must be from gas leakage in rear-end crashes." *Id.*

[342]*Id.* at 83-84, 89 (describing the auto industry's panicked response to proposed standards which response led to delay of the standards' promulgation until "1,513,399 Pinto sedans were built and sold," six years later).

[343]*See, e.g.*, Industrial Union Dep't v. American Petroleum Inst., 49 U.S.L.W. 1007 (1980). Under section 3(8) of the Occupational Safety and Health Act, an occupational

J. Statutes of Limitation and Statutes of Repose

In *Amermac, Inc. v. Gordon*,[344] the court discussed whether product liability actions for personal injury in Indiana should be governed by the Uniform Commercial Code (U.C.C.) provision for a four-year statute running from tender of delivery of the product,[345] or the tort statute of limitations, which gives a plaintiff two years from date of injury to bring his action.[346] The court noted that some states provide that the U.C.C. limitation applies where privity exists between the parties, while others apply the tort statute in all personal injury cases.[347] The court found authority in a Michigan court's conflict of laws decision which held that Indiana courts would apply the U.C.C. limitation in cases covered by the U.C.C. and the tort limitation in non-U.C.C. cases.[348]

In *Amermac*, the plaintiff qualified for neither statute because over four years had elapsed from the time of delivery of the product and over two years had elapsed from the time of injury. The plaintiff's attempt to qualify under still another statute of limitations, the six-year statute governing breach of implied contract actions, was rejected by the court inasmuch as this provision in respect to breach of warranty actions had been repealed by the Indiana legislature in 1971.[349]

The *Amermac* court did not decide which of the two remaining limitation statutes would prevail in another case, but it is reason-

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safety and health standard is defined as one " 'reasonably necessary and appropriate to provide safe and healthful employment.' " *Id.* at 1007. The Secretary of Labor took the position that this mandate as applied to a carcinogen such as benzene meant he must " 'set the standard that most adequately assures, to the extent feasible on the basis of the best available evidence that *no employee* will suffer material impairment of health or functional capacity.' " *Id.* (emphasis added). The Secretary of Labor further stated that " '*there is no "safe" exposure level* and that under § 6(b)(5) he must set an exposure limit at the lowest technologically feasible level that will not impair a regulated industry.' " *Id.* (emphasis added). Although the Supreme Court rejected the Secretary's position (5-4), only Justice Powell observed "that the Secretary's conclusion that the cost of benzene regulation was justified is not supported by the record." *Id.* Three others in the majority indicated that the Secretary failed because he produced *no evidence* of an unsafe workplace. Four dissenters rejected the validity of cost-benefit analysis unless explicitly provided for by Congress in the statute. " '[A]n activity is "feasible" if it is capable of achievement, not if its benefits outweigh its costs.' " *Id.* (emphasis added). *See* Wheeler, *Cost-Benefit Analysis on Trial: A Case of Delusion and Reality*, Nat'l L.J., Oct. 20, 1980, at 28, col. 1.

[344]394 N.E.2d 946 (Ind. Ct. App. 1979).

[345]IND. CODE § 26-1-2-725 (1976).

[346]*Id.* § 34-1-2-2.

[347]394 N.E.2d at 948 n.3.

[348]*Id.* at 948 n.2 (citing Waldron v. Armstrong Rubber Co., 64 Mich. App. 626, 236 N.W.2d 722 (1975)).

[349]394 N.E.2d at 949.

able that the determination should be made on the basis of the characterization of the action in the complaint as sounding in contract (warranty) or tort would determine which limitation statute would govern, assuming that the privity and other U.C.C. tests for a U.C.C. warranty action could be met.

The *Amermac* court also noted the existence of a repose statute enacted in 1978 to govern product liability actions in Indiana.[350] A repose statute begins to run from the defendant's act rather than from the invasion of the plaintiff's rights. The Indiana Product Liability Act[351] provides for a cessation of all tort product liability ten years after a product's initial delivery unless the injury occurs in the ninth or tenth year of the product's life, in which case the statute is extended for a period ending two years from the date of injury.[352] The court cited this statute as authority for its finding that the Indiana legislature accepts the concept that a limitation can run from the moment defendant introduces a product into the stream of commerce even though plaintiff has not yet been injured.[353]

In so linking the Indiana Product Liability Act's repose provision with the U.C.C. four-year limitation, the court apparently found no basic conceptual difference between them. The U.C.C. language, however, suggests that an action for breach of implied warranty accrues at tender of delivery.[354] Knowledge of the breach is immaterial but tender of a defective product provides plaintiffs in privity with the seller with an immediate cause of action nevertheless.[355] Although the original seller's liability will cease four years after he tenders delivery, subsequent sellers will restart the clock as to their potential warranty liability at the moment of resale. Conceptually, the U.C.C. statute differs from the ten-year outer cut-off provision of the Product Liability Act in that a U.C.C. purchaser theoretically possesses a breach of warranty action for four years while a plaintiff who first encounters and is then injured by an eleven-year-old product will be barred from his tort action before any right has accrued.

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[350]IND. CODE § 33-1-1.5-5 (Supp. 1980). For an analysis of this section of the Indiana Product Liability Act, *see* Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 249-53 (1979).

[351]IND. CODE §§ 33-1-1.5-1 to -8 (Supp. 1980).

[352]*Id.* § 33-1-1.5-5.

[353]394 N.E.2d at 948 n.4. *See generally*, Phillips, *An Analysis of Proposed Reform of Products Liability, Statutes of Limitations*, 56 N.C.L. REV. 663 (1978); Note, *When the Product Ticks: Products Liability and Statutes of Limitations*, 11 IND. L. REV. 693 (1978).

[354]IND. CODE § 26-1-2-725(2) (1976) provides in part: "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made . . . ."

[355]*Id.*

But what about plaintiffs not in privity with the seller? In *Amermac*, the plaintiff was an employee of the product purchaser. As to an employee the U.C.C. provision, if applicable, would be, in effect, a repose statute because a plaintiff not in privity with the seller has no cause of action until he is injured. To give him the benefit of his employer's four-year U.C.C. statute of limitations would appear to be unsound.

In *Ferdinand Furniture Co. v. Anderson*,[356] the plaintiff sought to maintain his action for damage to personal and real property more than two years after the fire and four years after delivery of the alleged defective oven. The court ruled plaintiff was barred in respect to the personal property but the statute of limitations "for injuries to property other than personal property is six years."[357]

K. Damages and Remedies

1. Size of Awards.—Several jury verdicts were attacked during the survey period as providing for excessive compensatory damages. In *Bemis Co. v. Rubush*[358] the court in affirming a $750,000 judgment for an injured employee stated this rule:

> The amount of recovery, where damages are not a mere matter of computation, is largely within the discretion of the trier of the facts, and will not be disturbed by the reviewing court on the grounds of excessiveness unless the award is so grossly, outrageously great as to indicate prejudice, partiality, corruption or other improper motive. The amount assessed must appear to be so outrageous as to impress the court at first blush with its enormity. The fact that a trial court or jury assessed higher damages than this court would have assessed is no reason why the judgment should be set aside.[359]

The court, in finding the damages not excessive as a matter of law, considered plaintiff's "age, prior good health, his capacity for vigorous activity, [and] the substantial evidence, both from lay and professional witnesses, as to the critical . . . nature of the injuries."[360]

In *Huff v. White Motor Corp.*,[361] a diversity case, the award to the widow was also challenged as excessive. The court noted that federal standards rather than state law would apply to the damages issue.[362] The court quoted a passage from *Dagnello v. Long Island*

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[356]399 N.E.2d 799 (Ind. Ct. App. 1980).

[357]*Id.* at 803 (citing IND. CODE § 34-1-2-1 (1976)).

[358]401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

[359]*Id.* at 64 (citations omitted).

[360]*Id.*

[361]609 F.2d 286 (7th Cir. 1979).

[362]*Id.* at 295.

Rail Road[363] setting forth the federal rule,[364] but there seems to be little difference from the Indiana rule quoted above. The federal court "[i]n applying the *Dagnello* standard [felt required] to make a 'detailed appraisal of the evidence bearing on damages.'"[365] The court reviewed the expert economist's computation of economic damages of $285,600 and found it "expansive" but noted that the defendant had not challenged that component of the award. Instead, the defendant had focused on the $115,000 award for loss of decedent's counseling and guidance, and $276,000 for the loss of love and affection by pointing out the disparity of these amounts compared with the decedent's modest economic circumstances.[366]

The appellate court was uncomfortable when it affirmed the award because research proved its size was unprecedented in wrongful death actions. The appellate court stated it "might well have set aside the verdict or ordered a remittitur had we been presiding at trial" but it could not describe the award as "grossly excessive" or "monstrous."[367] The court did note that with respect to the intangible damages, the fact that the plaintiff and her decedent were of modest circumstances did not in itself provide a basis for valuing her loss of counseling and guidance, loss of love and affection "lower than a similar loss to one in more fortunate economic circumstances."[368] The court noted that "[t]hese intangible elements of damages are concededly recoverable under Indiana law."[369]

In *American Optical Co. v. Weidenhamer*,[370] the defendant asserted that "the damage award must have been based upon passion, prejudice and undue influence" and therefore it alleged "the damages were excessive."[371] The court examined the evidence relating to the plaintiff's life expectancy, his eyesight before the accident, his pain, suffering, and impairment of vision during his treatment and convalescence, and the extent of permanent injury he would be left with.[372] The court concluded that an award of $57,724.45 which was approximately eight times his actual expenses was not "inherently excessive."[373] Nor did the court give any credence to the defendant's hypothesizing that "the jury was probably influenced and angered

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[363]289 F.2d 797 (2d Cir. 1961).

[364]*Id.* at 806.

[365]609 F.2d at 296.

[366]*Id.*

[367]*Id.* at 297.

[368]*Id.* at 296.

[369]*Id.*

[370]404 N.E.2d 606 (Ind. Ct. App. 1980), *petition for transfer filed* Aug. 22, 1980.

[371]*Id.* at 627.

[372]*Id.* at 627-28.

[373]*Id.* at 627.

by the directed verdict in favor of Harvester [a co-defendant]."[374] It concluded that the defendant's allegation was "pure speculation, not really worthy of consideration."[375]

2. Punitive Damages.—a. Wrongful death; equal protection.— The Seventh Circuit Court of Appeals was asked to rule in *Huff v. White Motor Corp.*[376] whether a 1965 amendment to the Indiana wrongful death statute authorized punitive damages.[377] The amendment states that damages will include but *will not be limited* to "reasonable medical, hospital, funeral and burial expenses, and lost earnings . . . ."[378]

The court noted that prior to the amendment, punitive damages were not recoverable in wrongful death actions, "because the sole purpose of the statute was to compensate wrongful death claimants for pecuniary loss occasioned by the wrongful death."[379] The court interpreted the "including but not limited to" language of the amendment to refer to a legislative intent not to exclude "the other factors a jury may consider in assessing *compensatory* damages, e.g., loss of care, love and affection, and of training and guidance for children."[380] The court concluded "that the Indiana legislature would [not] so obliquely adopt such a significant change."[381]

The plaintiff in *Huff* raised an alternative equal protection argument against wrongful death statutes which bar punitive damages, claiming that such restrictive statutes were invidious discrimination favoring other classes of tort claimants. The court found the argument without merit because the alleged class discriminated against was not a suspect class and, therefore, a rational basis test was appropriate.[382] Whereupon the court found that "[p]laintiff has not persuaded us that the adoption of § 34-1-1-2 without a provision authorizing awards of punitive damages was irrational."[383] The court noted that "[t]he equal protection clause of the Indiana Constitution is coextensive with the federal equal protection clause . . . and therefore is not offended by the statute."[384]

b. Willful and wanton misconduct.—Willful and/or wanton misconduct is frequently the basis for punitive damages. The plaintiff in

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[374]*Id.* at 628.
[375]*Id.*
[376]609 F.2d 286 (7th Cir. 1979).
[377]*Id.* at 297.
[378]*Id.* (quoting IND. CODE § 34-1-1-2 (1976)).
[379]609 F.2d at 297 (citation omitted).
[380]*Id.*
[381]*Id.*
[382]*Id.* at 298.
[383]*Id.*
[384]*Id.*

Conder v. Hull Lift Truck, Inc.[385] alleged such misconduct and tendered an instruction which would permit the jury to find willful or wanton misconduct if it found "that the defendant Allis-Chalmers Corporation had actual knowledge that the design of its forklift truck was defective in that it did foresee that there was a hazard which could result from foreseeable misadjustments . . . and that the defendant . . . deliberately and intentionally did not warn of the hazard . . . ."[386]

The court held this instruction was an incorrect statement of the law. It noted that the plaintiff, to prove willful or wanton misconduct, must show defendant had "knowledge of an *impending* danger or have been conscious of a course of misconduct calculated to result in *probable* injury. Second, the defendant's actions must have exhibited his indifference to the consequences of his conduct."[387] The court emphasized that "[i]t is the *probability* or *likelihood* of injury"[388] which distinguishes reckless or wanton conduct from mere negligence. The plaintiff's instruction "would have informed the jury that liability for willful and wanton misconduct could attach if Allis-Chalmers knew 'a hazard . . . *could* result from foreseeable misadjustments . . . .' However, conduct which merely *could*, or *might possibly* result in injury does not amount to willful and wanton misconduct."[389]

3. Damage to Personality: Effect on Marriage.—The jury in *Bemis Co. v. Rubush*[390] was instructed "that, if it found that the dissolution of the Rubush marriage was a proximate result of Gary's injuries, the jury could consider as an element of any damage to Phyllis the value of her loss of consortium after the date of the dissolution."[391] The appellate court held this instruction was error because it would in effect recognize a "cause of action for 'wrongful divorce' and this we will not do."[392] Noting that under Indiana law, death of the injured spouse ends the compensable period for loss of consortium, the court held there should be no difference when the marriage ends by dissolution.[393] The court also held that the dissolution of the marriage was not proximately caused by the product defect which injured the husband because "[t]he dissolution of the Rubush marriage and the resulting loss by Phyllis of all those bene-

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[385]405 N.E.2d 538 (Ind. Ct. App. 1980).
[386]*Id.* at 547.
[387]*Id.*
[388]*Id.*
[389]*Id.*
[390]401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.
[391]*Id.* at 63.
[392]*Id.* at 64.
[393]*Id.* at 63.

fits covered by the rubric 'consortium' would not be harms objectively reasonable to expect from the actions of Bemis."[394]

Applying a proximate cause analysis based on foreseeability in the *Bemis* context is unfortunate. Clearly the dissolution of a marriage when an injury causes severe personality changes and impotence is an objectively foreseeable event which is not particularly attenuated from the product defect, or separated from it by independent superseding intervening causes. There are adequate policy grounds for cutting off Mrs. Rubush's consortium recovery after the dissolution of her marriage without recourse to a tortured proximate cause analysis.

When injuries involving personality changes and their effects do have to be submitted to a jury for a causation finding, the issue frequently centers on cause in fact, rather than proximate cause. In *Hedges v. Public Service Co. of Indiana*,[395] the plaintiff attempted to prove that his electrical shock injury was a cause in fact of alterations in his personality which in turn resulted in his marriage difficulties. Defendant sought to rebut plaintiff's evidence of post accident difficulties in relating to people, including the marital difficulties, by introducing evidence of plaintiff's four earlier marriages. The court held that the evidence of the preaccident marriages was relevant because it logically tended to prove a material fact.[396] The defendant's evidence suggested that there may have been another sole or concurring cause in fact of plaintiff's personality problems which existed prior to, and independent from, the accident.

L. Abnormally Dangerous Activities

The doctrine of strict liability is applied today in two major areas of tort law, product liability and abnormally dangerous activities. Occasionally the two areas converge.

In *Hedges v. Public Service Co. of Indiana*,[397] the plaintiff alleged first that the electricity which injured him was a defective product because it was transmitted in uninsulated transmission lines, strung with insufficient warnings, too close to the ground. Alternatively, the plaintiff argued that the doctrine codified in the Restatement (Second) of Torts, section 520, dealing with abnormally dangerous activities, should be adopted to apply to the transmission of high-voltage electricity by power companies.[398] The court noted that

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[394]*Id.* at 64.

[395]396 N.E.2d 933 (Ind. Ct. App. 1979).

[396]*Id.* at 937-38.

[397]*Id.* at 933.

[398]*Id.* at 936 n.3. (The RESTATEMENT (SECOND) OF TORTS § 520 (1976), dealing with abnormally dangerous activities, is quoted in full.).

although section 520 has not been explicitly adopted in Indiana, the doctrine it espouses has been applied to blasting cases.[399] However, the court rejected the application of the abnormally dangerous activity doctrine to electrical transmission. The court cited *Petroski v. Northern Indiana Public Service Co.*[400] in reiterating that "the standard of care required in Indiana is 'such care as a person of [reasonable] prudence would [ordinarily] use under like conditions and circumstances.'"[401]

The court found that reasonable care included insulation of lines where persons were likely to get at them, but stated no covering was required "when the lines are sufficiently isolated so that the general public could not reasonably be expected to come in contact with them."[402]

M. Alternative Designs

In *Meadowlark Farms v. Warken*,[403] the plaintiff was injured by a corn auger while unloading corn from his truck using a tailgate control mechanism which the defendant asserted was dangerous. The defendant, who provided the auger, argued that the failure to use a less dangerous method was the sole proximate cause of the accident. During cross examination the defendant sought to question the plaintiff with respect to alternative unloading methods and designs. The trial court cut off this questioning as improper and speculative.[404]

The appellate court did not rule on the propriety of the questioning, or the possible impropriety of cutting it off, but the court noted that the witness had been adequately examined on the subject in question, elsewhere in the cross examination.[405] The appellate court's ruling implied that the issue of a safer method of unloading known to the plaintiff prior to the accident, but not employed by the plaintiff at the time of the accident, could be relevant to the issue of proximate cause.[406]

Generally it is the plaintiff, however, who seeks to introduce evidence of safer alternative designs. In *Dias v. Daisy-Heddon*,[407] the

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[399]*Id.* at 936 n.4. The court cites several Indiana blasting cases.

[400]354 N.E.2d 736 (Ind. Ct. App. 1976).

[401]396 N.E.2d at 937.

[402]*Id.*

[403]376 N.E.2d 122 (Ind. Ct. App. 1978).

[404]*Id.* at 137.

[405]*Id.* at 137-38.

[406]"The apparent thrust of Meadowlark's attempted cross-examination was to show that Warken might have, or should have, considered different methods to unload the corn, and that his failure to take a different course of action was the proximate cause of his injury." *Id.* at 137.

[407]390 N.E.2d 222 (Ind. Ct. App. 1979).

plaintiff, who was injured by a side-loading BB gun, sought to introduce evidence that a safer barrel-loading model existed and indeed was manufactured by the defendant. The trial court sustained the defendant's objection to introduction of evidence of the alternate design "on the basis that the design used was a choice Daisy had a right to make . . . . The [trial] court stated that the plaintiffs were taking a completely different type of gun which was built in an entirely different way trying to show how they should have built the BB gun."[408]

The appellate court found error in the trial court's suppression of this alternative design evidence. "It appears that evidence of alternative designs may be relevant to the question of whether the design in question is unreasonably dangerous."[409] The court cited *Walters v. Kellam & Foley*[410] in which that court had "noted that the evidence of custom and alternative design was within the bounds of Indiana law relating to hypothetical questions and that it should have been admitted."[411] The court also held that manufacturers "are charged with the knowledge of experts in their fields of interest."[412] Presumably the allegedly safer design is relevant to proving defendant had knowledge of a safer alternative prior to the accident. While holding that the evidence of an existing alternative design should have been admitted, the court found the error not reversible because evidence of safer design feasibility was introduced by other witnesses during other stages of the trial.[413]

N. Conclusion

With respect to product liability law, this survey period has been one of the most active and significant in the history of Indiana's appellate courts. In dealing with vigorous plaintiff challenges to long held defenses and doctrines, the courts have appeared for the most part to have been guided in their decisions by the basic policy of section 402A of the Second Restatement which seeks to assign liability to sellers of defective products that are unreasonably dangerous. As a result of the *Bemis*, *Shanks*, *Conder*, and *Weidenhamer* decisions, in particular, manufacturers and other sellers of products, especially for the workplace, can now expect to shoulder, in Indiana, an increased responsibility for product safety.

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[408] *Id.* at 226.
[409] *Id.*
[410] 360 N.E.2d 199 (Ind. Ct. App. 1977).
[411] 390 N.E.2d at 226.
[412] *Id.* at 227.
[413] *Id.*

II. Administrative Law

HAROLD GREENBERG*

A. Scope of Judicial Review

1. The Substantial Evidence Test.—The uncertainty and confusion created by differing interpretations of the "substantial evidence test" in different districts of the court of appeals, which were discussed in the 1979 Administrative Law Survey,[1] may have been resolved during the current survey period.[2] At issue was whether the reviewing court, in determining whether the administrative decision is supported by substantial evidence, must examine the whole record or merely the evidence most favorable to the successful party. As noted in the 1979 Survey, the second, third and fourth district courts of appeals follow the principle of whole record review, but the first district court of appeals adhered to one-sided review.[3]

In *Citizens Energy Coalition, Inc. v. Indiana & Michigan Electric Co.*,[4] the first district court of appeals, without mentioning its earlier decision which expressly followed the one-sided approach,[5] specifically adopted the standard of whole record review as enunciated in *L.S. Ayres & Co. v. Indianapolis Power & Light Co.*[6] and *City of Evansville v. Southern Indiana Gas & Electric Co.*[7] The court appropriately observed that the substantial evidence test is difficult to define (and to apply) but was perhaps best stated in *L.S. Ayres*:

> "[W]e conclude that the substantial evidence standard authorizes a reviewing court to set aside Commission findings of fact when *a review of the whole record* clearly indicates that the agency's decision lacks a reasonably sound

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[1]Greenberg, *Administrative Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 39, 39-42 (1980).

[2]The word "may" is used advisedly, for reasons which will appear below.

[3]Greenberg, *supra* note 1, at 39-42. The two cases which clarified the situation in the third and fourth districts, Indiana Civil Rights Comm'n v. Sutherland Lumber, 394 N.E.2d 949 (Ind. Ct. App. 1979), and Old State Utility Corp. v. Greenbriar Dev. Corp., 393 N.E.2d 785 (Ind. Ct. App. 1979), were both decided during the current survey period rather than the 1979 period, but were noted in the 1979 Survey because of their importance to resolution of the problem. *See* Greenberg, *supra* note 1, at 41 n.15.

[4]396 N.E.2d 441 (Ind. Ct. App. 1979).

[5]Indiana Civil Rights Comm'n v. Holman, 380 N.E.2d 1281, 1284 (Ind. Ct. App. 1978).

[6]169 Ind. App. 652, 663-65, 351 N.E.2d 814, 823-24 (1976).

[7]167 Ind. App. 472, 484, 339 N.E.2d 562, 572 (1975).

basis of evidentiary support. *See Universal Camera Corp. v. NLRB* (1951), 340 U.S. 474, 490, 71 S.Ct. 456, 95 L.Ed. 456."[8]

Unfortunately, uniformity among the districts which resulted from *Citizens Energy Coalition* was clouded by *Wilfong v. Indiana Gas Co.*,[9] in which a real estate developer challenged the Public Service Commission's decision authorizing the gas company to refuse to supply service to new customers. In reviewing the commission's decision, the fourth district court of appeals correctly observed that it could not disturb the decision if it was supported by substantial evidence and that the court cannot reweigh the evidence but is bound by the administrative findings of fact if they are supported by the evidence. The court then added, "We consider only the evidence favorable to the decision."[10]

Similarly, in *White v. Woolery Stone Co.*,[11] a worker's compensation disability case, the second district court of appeals stated: "On appeal, this court may not weigh the evidence and, where there is a conflict in the evidence, it can consider only the evidence which tends to support the Board's award."[12]

The same court made an almost identical statement in *Kuntz v. Review Board of Indiana Employment Security Division*,[13] to which the court added, "On appeal, we may only disturb the decision of the Review Board if reasonable persons would be bound to reach a different conclusion on the evidence in the record."[14]

Possible guidance out of this quandary may be gleaned from *Kuntz* and from *Penn-Dixie Steel Corp. v. Savage*,[15] also a worker's compensation case. The court reiterated that it "will not weigh the evidence and, where there is a conflict . . . will only consider the evidence which tends to support the [agency's] award and which is most favorable to the appellee."[16] However, the court continued that an appeal which challenges the sufficiency of the evidence on which the agency based its award

"will be limited:

'. . . to an examination of the evidence to ascertain whether the finding . . . does not rest upon a substan-

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[8]396 N.E.2d at 447 (quoting L.S. Ayres & Co. v. Indianapolis Power & Light Co., 169 Ind. App. at 664, 351 N.E.2d at 823) (emphasis added.)

[9]399 N.E.2d 788, 790 (Ind. Ct. App. 1980).

[10]*Id.*

[11]396 N.E.2d 137 (Ind. Ct. App. 1979).

[12]*Id.* at 139 (citations omitted).

[13]389 N.E.2d 342 (Ind. Ct. App. 1979).

[14]*Id.* at 344 (citations omitted).

[15]390 N.E.2d 203 (Ind. Ct. App. 1979).

[16]*Id.* at 206 (citations omitted).

> tial factual foundation. We may reverse the award only . . (1) If it should appear that the evidence . . . was devoid of probative value; (2) That the quantum of legitimate evidence was so proportionately meager as to show that the finding does not rest upon a rational basis or; (3) That the result must have been substantially influenced by improper considerations.' Pollock v. Studebaker Corp. (1951), 230 Ind. 622, 625, 105 N.E.2d 513, 514.
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> On appeal, this Court cannot weigh the evidence . . . to determine for whom it preponderates, and only if reasonable men would be bound to reach the opposite conclusion from the evidence in the record, may the decision . . . be reversed."[17]

Taking all of these cases together, the proper approach appears to be (and should be) (1) that the court will look to the whole record to determine if substantial evidence, that is, "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,'"[18] supports the agency's finding, and (2) that unless reasonable men would find to the contrary, the agency's decision must be sustained. If the inferences supporting the award are reasonable, the award will be sustained. If they are not, the court will not and should not permit those inferences to be drawn and will reverse the award unless other probative evidence supports it. The language about considering only those inferences which support the administrative decision or only that evidence favorable to the award winner tends to confuse and may be interpreted by some to suggest improperly the appropriateness of one-sided review.

As Professor Schwartz has stated, "The substantial evidence test is a test of the *reasonableness*, not of the *rightness*, of agency findings of fact."[19] The court should look to the whole record to determine if reasonable men could differ as to the evidence or if the evidence compels the agency's decision. In either event, the agency's decision should be affirmed.

2. Standard of Review; Right to Review.—The appellant claimed in *Salk v. Weinraub*[20] that the trial court had utilized the wrong standard in reviewing the propriety of approval of a downtown renewal project by the Fort Wayne Redevelopment Commission.

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[17]*Id.* at 206-07 (quoting Bohn Aluminum & Brass Co. v. Kinney, 161 Ind. App. 128, 134, 314 N.E.2d 780, 784 (1974)).

[18]Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

[19]B. SCHWARTZ, ADMINISTRATIVE LAW § 211, at 596 (1976) (emphasis in original).

[20]390 N.E.2d 995 (Ind. 1979).

The applicable statute purported to limit review to the question of public utility and benefit.[21] The Supreme Court ruled, however, that there is a constitutional right to judicial review of administrative decisions in Indiana which may not be limited to questions of public utility and benefit.[22] Therefore, the trial court, in the sound exercise of its discretion, had properly applied the standard of review set forth in the Administrative Adjudication Act.[23] The court has made it quite clear that unlike federal administrative law, which does permit congressional limitations on judicial review of administrative decisions,[24] Indiana law precludes any such limitations.[25]

3. Review of Rulemaking.—In *Indiana Environmental Management Board v. Indiana-Kentucky Electric Corp.*,[26] the agency argued that Indiana courts have no authority to review quasi-legislative rulemaking; consequently, data supporting the validity of rules was not necessary.[27] To the contrary, replied the court, Indiana courts have historically reviewed the reasonableness of quasi-legislative regulations. Therefore, on appeal the regulation must be accompanied by supporting data to facilitate that review.[28]

Concern that the decision may lead to "judicial oversight of the reasonableness of administrative legislation," as expressed in the dissenting opinion,[29] apparently with the feared result that courts

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[21]IND. CODE § 18-7-7-15 (1976) provides: "The only ground of remonstrance which said [reviewing] court shall have the power or jurisdiction to hear shall be the question whether the proposed project will be of public utility and benefit . . . ."

[22]390 N.E.2d at 997.

[23]*Id.* The Administrative Adjudication Act, IND. CODE §§ 4-22-1-1 to -30 (1976) was intended to promote uniformity in the review of administrative decisions. The court noted that while the Redevelopment Commission is a local agency not within the Administrative Adjudication Act, the Act's standard of review, as set forth in IND. CODE § 4-22-1-18 (1976), was appropriate.

[24]The Administrative Procedure Act, 5 U.S.C. § 701(a) (1976), states that the provisions on judicial review apply "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

[25]A similar result was reached in Gerhardt v. City of Evansville, 408 N.E.2d 1308 (Ind. Ct. App. 1980), decided after the close of the survey period, in which the court declared unconstitutional a statutory limitation of judicial review to only those suspensions of police officers in excess of ten days. The case is discussed more fully at note 137, *infra*.

[26]393 N.E.2d 213 (Ind. Ct. App. 1979).

[27]*Id.* at 221. The brief of appellants, however, does not seem to go quite so far, the written argument apparently being that *findings of fact* are not required in rulemaking unless the rule-making procedure itself must, pursuant to statute, include an adjudicatory-type hearing. *See* Brief of Appellant at 15-28, Indiana Environmental Management Bd. v. Indiana-Kentucky Elec. Corp., 393 N.E.2d 213 (Ind. Ct. App. 1979) [hereinafter cited as Brief of Appellant].

[28]393 N.E.2d at 221.

[29]*Id.* at 222.

will supercede agency decisions as to what regulations are needed, is unfounded. One of the cases cited by the court for support clearly states that a quasi-legislative regulation "is subject to the same test as to reasonableness and the basic facts justifying the regulation as would be applied if the legislature had enacted the regulation as a statute."[30] Moreover, the Illinois case from which the court quoted extensively[31] emphatically declared that since the statute required the agency to take into account certain factors in adopting regulations, there must be some basis on which the court may determine if the agency indeed had adhered to the legislative mandate and had taken those factors into account. The wisdom of the regulation was not an issue.[32]

B. The Requirement of Findings

A basic issue in the *Indiana-Kentucky Electric Corp.* case[33] was whether the statute required the Environmental Management Board to make findings of fact in the course of rulemaking when it required the Board to "take into account" certain factors.[34] The court attributed to the phrase "taking into account" its "plain meaning" and construed the legislative intent as requiring only meaningful supporting data, as noted in the preceding section of this Article, rather than formal, quasi-adjudicatory findings of fact.[35]

Instead of flatly invalidating the majority of the Board's regulations because of the absence of the necessary supporting data, which

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[30]Florida Citrus Comm'n v. Owens, 239 So. 2d 840, 848 (Fla. Dist. Ct. App. 1969). The Florida court found the reasons expressed in support of a regulation of advertising and labeling insufficient to withstand an attack on equal protection grounds.

[31]Commonwealth Edison Co. v. Pollution Control Bd., 25 Ill. App. 3d 271, 323 N.E.2d 84 (1974), *rev'd in part on other grounds*, 62 Ill. 2d 494, 343 N.E.2d 459 (1976), *quoted in* 393 N.E.2d at 220.

[32]25 Ill. App. 3d at 287-88, 323 N.E.2d at 95.

[33]393 N.E.2d 213 (Ind. Ct. App. 1979).

[34]*See id.* at 219-21. IND. CODE § 13-7-7-2(b) (1976) states:

> In approving regulations and establishing standards, the board or an agency shall take into account all existing physical conditions and the character of the area affected; past, present and probable future uses of the area, including the character of the uses of surrounding areas; zoning classifications; the nature of the existing air quality or existing water quality, as the case may be; technical feasibility, including the quality conditions that could reasonably be achieved through coordinated control of all factors affecting the quality; and economic reasonableness of measuring or reducing any particular type of pollution. The board and the agencies shall take into account the right of all persons to an environment sufficiently uncontaminated as not to be injurious to human, plant, animal or aquatic life, or to the reasonable enjoyment of life and property.

[35]393 N.E.2d at 220-21.

the Board could have supplied, the court remanded to the Board so that the agency could demonstrate that the appropriate factors had been taken into account.[36] Certain of the regulations, however, were invalidated because a single hearing officer had heard the matter and that officer had failed to report to the Board his "findings and recommendations" as required by the statute in those instances where only a single hearing officer presides.[37] In the absence of such findings, the regulations which resulted from such hearings could not stand.[38]

The necessity for and the adequacy of findings arise at two stages in the administrative process: first, when the agency renders its decision after hearing, and second, when a trial-level court reviews the agency's decision and rules thereon.

The courts have been quite emphatic that administrative agencies must make written findings.[39] In *Stokely-Van Camp, Inc. v. State Board of Tax Commissioners*,[40] an appeal from disallowance of a special valuation, the court held that despite the fact that the statute under which the Board conducted its reassessment did not specifically require written findings and despite the fact that the Board is excluded from the requirements of the Administrative Adjudication Act, "there is . . . ample authority for the concept that written findings should be required, regardless of whether the statute requires it."[41] In order for the court to perform its task of determining if substantial evidence supports the findings and decision of the agency and whether the agency acted arbitrarily and capriciously or abused its discretion, the courts must have written findings to review.[42]

What is required in satisfactory findings of fact was restated in *Penn-Dixie Steel Corp. v. Savage*[43]: "[A] simple, straight-forward statement of what happened . . . in sufficient relevant detail . . . so that the [reviewing] court may determine whether the [agency] has resolved [the contested issues] in conformity with the law."[44] The findings in *Penn-Dixie*, a disability compensation case, were characterized by the court as "skimpy" because it was difficult for

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[36]*Id.* at 222.

[37]*Id.* at 217; *see* IND. CODE § 13-7-7-1(c) (1976).

[38]393 N.E.2d at 216-17, 222.

[39]*See* Greenberg, *supra* note 1, at 51-52.

[40]394 N.E.2d 209 (Ind. Ct. App. 1979).

[41]*Id.* at 210. *Accord*, Connell v. City of Logansport, 397 N.E.2d 1058, 1062 (Ind. Ct. App. 1979).

[42]394 N.E.2d at 211.

[43]390 N.E.2d 203 (Ind. Ct. App. 1979).

[44]*Id.* at 205 (quoting Whispering Pines Home for Senior Citizens v. Nicolek, 333 N.E.2d 324, 326 (Ind. Ct. App. 1975)) (emphasis omitted).

the court to determine from those findings which injury had caused the claimant's disability.[45] However, the evidence was sufficient to support an award based on either injury, so the court found it unnecessary to remand for further proceedings.[46]

Old State Utility Corp. v. Greenbriar Development Corp.,[47] which involved administrative revocation of rights to render utility service, stated that findings are required in order "to facilitate accurate and expeditious judicial review of administrative proceedings," and must contain "specific, basic facts which are material to the ultimate facts upon which an order is based."[48]

If considered by themselves, the findings would not have been sufficient in *Connell v. City of Logansport*,[49] a police officer disciplinary case. The court noted, however, that the written reasons or charging document given to the officer prior to the hearing and referred to by the administrative agency in its findings did contain extensive statements and factual allegations of wrongdoing. Reading the charging document and the findings together, the court discerned sufficient specificity on which it could make an intelligent decision.[50]

The court of appeals distinguished *Connell* in *State v. Board of School Trustees*,[51] in which the Board cancelled the employment contract of a tenured teacher. The only finding made by the Board was that the reasons given in the charging specifications for cancellation of the contract had been proven.[52] This might have been sufficient under *Connell* had the charging specifications themselves been sufficiently specific. However, the court found that in those specifications, the Board had "failed and refused to advise [the teacher] specifically of the conduct it deemed to constitute 'insubordination, neglect of duty and undermining the public confidence in the normal education process.'"[53] Accordingly, the court remanded with directions either to make adequate findings of fact or to grant the teacher a new hearing.[54] The message to administrative agencies continues to be quite clear: be sufficiently specific in the findings of fact so as to advise the parties and the reviewing courts of the factual underpinnings for the conclusions and decision.

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[45]390 N.E.2d at 206.
[46]*Id.* at 208.
[47]393 N.E.2d 785 (Ind. Ct. App. 1979).
[48]*Id.* at 788.
[49]397 N.E.2d 1058 (Ind. Ct. App. 1979).
[50]*Id.* at 1062.
[51]404 N.E.2d 47 (Ind. Ct. App. 1980).
[52]*Id.* at 49.
[53]*Id.*
[54]*Id.*

Similarly, Indiana Trial Rule 52(A)(2) requires a trial court to make special findings of fact "in any review of actions by an administrative agency." The purpose is "to provide the parties and reviewing courts with the theory on which the judge decided the case in order that the right of review for error may be effectively preserved."[55] In *Salk v. Weinraub*,[56] a renewal project approval case, the supreme court ruled that mere recitation of the factual events leading to resolution of the issues—the identities of the parties and dates of events, etc.—followed by conclusions of law was insufficient. The court distinguished *Hawley v. South Bend Department of Redevelopment*,[57] commented upon in the 1979 Survey,[58] because in *Hawley* the trial court at least had set forth the ultimate facts, support for which could be found in the full and complete record of the case.[59] In *Salk*, not even the ultimate facts were stated. The supreme court did not deny the appeal, however, but retained control of the case and remanded to the trial court for adequate findings of fact.[60]

C. Hearsay Evidence

The "residuum rule"—that an administrative decision may not be based on inadmissible hearsay evidence admitted over objection unless supported by a "residuum" of competent evidence—which was reaffirmed in *C.T.S. Corp. v. Schoulton*[61] and was criticized in the 1979 Survey,[62] continues in full force and effect in Indiana.[63]

D. Standing

In *Lutheran Hospital Inc. v. Department of Public Welfare*,[64] three hospitals sought a declaratory judgment as to whether they were entitled to reimbursement from the county department of public welfare pursuant to the Hospital Commitment Act[65] for emergency treatment rendered (1) to pregnant indigents and (2) to indigents suffering from alcoholism, drug addiction, and emotional

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[55]Tippecanoe County Area Plan Comm'n v. Sheffield Developers, Inc., 394 N.E.2d 176, 183 (Ind. Ct. App. 1979).

[56]390 N.E.2d 995 (Ind. 1979).

[57]383 N.E.2d 333 (Ind. 1978).

[58]Greenberg, *supra* note 1, at 52.

[59]390 N.E.2d at 999; *see* 383 N.E.2d at 336.

[60]390 N.E.2d at 999.

[61]383 N.E.2d 293 (Ind. 1978).

[62]Greenberg, *supra* note 1, at 42-45.

[63]*See* Shoup v. Review Bd., 399 N.E.2d 771, 774 (Ind. Ct. App. 1980); Kriss v. Brown, 390 N.E.2d 193, 197 n.1 (Ind. Ct. App. 1979).

[64]397 N.E.2d 638 (Ind. Ct. App. 1979).

[65]IND. CODE § 12-5-1-1 (1976).

illness. The trial court held that the hospitals were entitled to reimbursement only for the second group. On appeal, the county challenged the constitutionality of the Act and the standing of the hospitals to bring the action. The hospitals, in turn, questioned the standing of the county to attack the constitutionality of the statute.

On the issue of the county's standing, the court of appeals declared that the rules of standing in Indiana require a party to demonstrate injury but that in this case the county neglected to allege any injury whatever. Accordingly, the county lacked standing to raise the constitutional issue.[66]

In order to demonstrate their own standing, the hospitals were required to show a substantial present interest and that their rights were directly affected by the county's policy of denying payment for the aforementioned groups of indigents. The court observed that the hospitals had expended $450,000 in rendering treatment, all of which would have been reimbursable if the indigents had been covered by the Act. This, the court held, constituted a sufficient present interest. The injury in fact resulting from no reimbursement was obvious.[67]

Lack of standing was the dispositive issue in *Aikens v. Alexander*,[68] in which members of the Public Employees Retirement Fund sought a mandatory injunction to compel transfer of funds into the Fund on the ground that the State Budget Agency had acted arbitrarily, capriciously, and in violation of the statutory funding requirements when the agency reduced the amount originally appropriated to the Fund. The court of appeals determined that "the trial court's findings of fact [did] not indicate demonstrable injury to a present and substantial interest"[69] of plaintiffs who, therefore, had no standing. The only effect of the failure to make the requested transfer of funds was the theoretical possibility that at some time in the future, payments might not be met, an effect characterized by the court as purely "speculative and conjectural."[70]

E. Finality

The Administrative Adjudication Act provides specifically that any person aggrieved by an order of an administrative agency shall be entitled to judicial review thereof in accordance with the provi-

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[66]397 N.E.2d at 645-46.
[67]*Id.* at 646.
[68]397 N.E.2d 319 (Ind. Ct. App. 1979).
[69]*Id.* at 324.
[70]*Id.* at 322-24.

sions of the Act.[71] However, the provisions may be invoked only if the action of the agency is "final," and in *South Bend Federation of Teachers v. National Education Association South Bend*,[72] the court found a lack of finality in the Indiana Education Employment Relations Board order, the effectuation of which NEA—South Bend sought to enjoin. Consequently, the appeal provisions of the Administrative Adjudication Act were inapplicable.[73] The court noted that a final order ends the proceedings and leaves nothing to be accomplished. In this case, the order merely directed the holding of a unit determination hearing and the conducting of an election if required; it was not final.[74]

F. Exhaustion

Further, because the order in *South Bend Federation of Teachers*[75] was not final, there remained the basic issue of whether the plaintiff-appellee should have been required to exhaust its administrative remedies prior to seeking judicial review. NEA—South Bend, the Federation, and the South Bend Community School Corporation had entered an election agreement in 1972 which set forth certain procedures for a new representation election that year and for any subsequent challenge to the winner of the election, which was NEA—South Bend. In 1973, the General Assembly enacted the Educational Employee Bargaining Act[76] which established somewhat less stringent procedures to be followed by a challenging organization prior to a new representation election.[77] The I.E.E.R.B. ordered a new election at the request of the Federation which had met the requirements of the Educational Employee Bargaining Act but not of the 1972 Agreement. NEA—South Bend sought to enjoin the election on the ground that the I.E.E.R.B. order was an unconstitutional impairment of NEA—South Bend's contract rights.

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[71]IND. CODE § 4-22-1-14 (1976) provides in part: "Any party or person aggrieved by an order or determination made by any such agency shall be entitled to a judicial review thereof in accordance with the provisions of this act."

[72]389 N.E.2d 23 (Ind. Ct. App. 1979).

[73]*Id.* at 29.

[74]*Id.*

[75]389 N.E.2d 23 (Ind. Ct. App. 1979).

[76]IND. CODE §§ 20-7.5-1-1 to -14 (1976 & Supp. 1980).

[77]The 1972 Agreement required that a challenging organization's petition for a new election be signed by thirty percent of the teachers in the bargaining unit and set forth specific language to be used to authorize the challenger to represent the signers. 389 N.E.2d at 25-26. The statute requires signatures of twenty percent of the teachers in the bargaining unit and less specific language of authorization. IND. CODE § 20-7.5-1-10 (1976).

The Federation argued that NEA—South Bend should have exhausted its administrative remedies by going through with the election and then by appealing should it lose; if NEA—South Bend should win, it would not have been harmed. Not so, responded the court. Ordinarily, the court is without jurisdiction to grant relief until administrative remedies have been exhausted. However, the requirement of exhaustion is relaxed where exhaustion would be futile or irreparable harm is likely to result.[78] In this case, even if NEA—South Bend were to win the election, its contract rights would be permanently impaired. The more stringent requirements of the 1972 Agreement, by its terms, applied only to a representation challenge to the winner of the 1972 election. Challenges to any winner of any later election would be governed by the less stringent statute. Thus, even if NEA—South Bend were to win a 1979 or 1980 election, it would lose its protection under the 1972 Agreement. Therefore, exhaustion was not required.[79] On the merits, the court of appeals affirmed the trial court's holding that the I.E.E.R.B. order unconstitutionally impaired NEA—South Bend's contract rights.[80]

A somewhat less clear result, which required that administrative remedies be exhausted, appears in *Southern Indiana Health Systems Agency, Inc. v. State Board of Health*.[81] An Evansville hospital requested approval of the Health Systems Agency (HSA) and the Board of Health for the purchase of an expensive piece of new equipment.[82] Such approval was required in order for the hospital to be reimbursed under certain federal programs. HSA recommended that the Board of Health disapprove the purchase, but the Board gave its approval and recommended to the Secretary of the United States Department of Health, Education and Welfare that the federal government reimburse the hospital if it should purchase the equipment.

The basic issue on HSA's petition for review of the Board's decision was whether HSA had failed to exhaust its administrative remedies. HSA contended that there was no administrative remedy available for it to exhaust: the review mechanism of the Health Act requires an HSA whose recommendation has been rejected by a

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[78]389 N.E.2d at 30.

[79]*Id.* at 31-32.

[80]*Id.* at 32.

[81]391 N.E.2d 845 (Ind. Ct. App. 1979).

[82]HSA was the designated planning agency for the Evansville area under the National Health Planning and Resources Development Act of 1974 (Health Act), 42 U.S.C. § 300*l*-4 (1976). The State Board of Health was conditionally designated the state health planning and development agency under the same Act, 42 U.S.C. § 300m (1976), and is the designated planning agency with regard to health care facilities in Indiana. Social Security Act § 1122, 42 U.S.C. § 1320a-1 (1976 & Supp. III 1979).

state agency such as the Board of Health to request review by another state agency designated by the Governor,[83] but the Governor had not designated any reviewing agency.

The court rejected HSA's argument that there was no administrative remedy to exhaust. "Even if no reviewing agency has been designated, it is by no means clear that a request for a review would not have prompted the Governor to designate an agency in time to conduct a review."[84] The dismissal of HSA's petition was therefore affirmed.[85] In this author's mind, it is by no means clear that a request for review would have prompted the Governor to do anything. In view of the notorious escalation of both government expenditures and medical costs, perhaps the better course would have been for the court to permit judicial review on the merits.

Similar in effect is *Indiana Forge & Machine Co. v. Northern Indiana Public Service Co.*,[86] in which the court held that a statute which limited review by the Public Service Commission of complaints about the reasonableness of utility rates to those complaints made by ten or more complainants,[87] did not deny redress to the plaintiff justifying the bypass of the administrative remedy.[88] If the allegedly unreasonable rate affected a significant number of customers, surely the statutorily required number of complainants could be found. If not, there was nothing to preclude the commission from initiating a review on its own motion after receiving a single complaint.[89]

Using quite forceful language, the court of appeals in *Thompson v. Medical Licensing Board*[90] required a physician to exhaust his administrative remedies rather than permit him, by way of suit for declaratory judgment or injunction, to challenge the Medical Licensing Board's proceeding to revoke or suspend his license. The court stated that the Administrative Adjudication Act "recognized the basic need for unfettered action by administrative agencies," that the Act restricts access to the courts so that "the exclusive path to the courts is *by review*," and that "if the administrative remedy has not been exhausted, a court does not have jurisdiction to take action."[91]

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[83]391 N.E.2d at 847; *see* 42 U.S.C. § 300m-1(b)(13) (1976).

[84]391 N.E.2d at 847-48.

[85]*Id.* at 848.

[86]396 N.E.2d 910 (Ind. Ct. App. 1979).

[87]IND. CODE § 8-1-2-54 (1976).

[88]396 N.E.2d at 913-14.

[89]*Id.* at 914.

[90]389 N.E.2d 43 (Ind. Ct. App.), *rehearing denied*, 398 N.E.2d 679 (Ind. Ct. App. 1979).

[91]389 N.E.2d at 46-47 (emphasis in original).

While the result in *Thompson* is sound, certain language in the opinion is troublesome in that it interprets the Administrative Adjudication Act as mandating exhaustion of administrative remedies even if the attack on the agency's action is of constitutional dimension.[92] Because *Thompson* involved mixed questions of both law and fact, for example, misconduct by the physician, bias of the trier of fact, dual functions of agency members, and vagueness, and because of the well established reluctance of courts to decide constitutional issues, the requirement of exhaustion was proper. Disposition of the factual issues could very well moot the constitutional issues. The clear implication of the court's opinion, however, is that even in a case which rests purely on constitutional grounds, exhaustion is required.[93]

In support of its position on this point, the court cited *State ex rel. Paynter v. Marion County Superior Court*,[94] but that case also involved questions of fact and law and did not rest solely on a constitutional challenge. *Paynter*, in turn, relied on *Myers v. Bethlehem Shipbuilding Corp.*,[95] the leading federal case on exhaustion, in which Mr. Justice Brandeis expressly noted that there was no contention that the statutory provisions and NLRB rules of procedure were illegal, only that the activity of respondent was outside NLRB jurisdiction, an issue dependent upon facts to be determined by the agency.[96]

The conclusion to be drawn from this analysis is that if the case involves only a question of constitutionality, with no facts to be

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[92]*Id.* at 47; see 389 N.E.2d at 51-52 (Sullivan, J., concurring), which expresses concern in this regard. The court's reasoning is based on §§ 3 and 14 of the Act. Section 3 states in part: "In every administrative adjudication in which the rights, duties, obligations, privileges or other legal relations of any person are required or authorized by statute to be determined by any agency the same shall be made in accordance with this act and not otherwise." IND. CODE § 4-22-1-3 (1976). Section 14 directs that the petition for appeal allege specifically how the agency's action is "contrary to constitutional right, power, privilege or immunity." *Id.* § 4-22-1-14(2).

[93]On the petition for rehearing, the physician contended that the court of appeals had failed to consider an issue at the initial stage of the appeal, namely, that a plaintiff who is suing under the U.S. Civil Rights Act, 42 U.S.C. § 1983 (1976), need not exhaust his administrative remedies, and that his suit to enjoin the disciplinary proceeding against him was indeed an action under § 1983. The court expressly held that although exhaustion of administrative remedies is not required if a § 1983 action is brought in the federal courts, the federal decisions are not applicable to § 1983 actions brought in state courts. Accordingly, the physician's failure to exhaust his administrative remedies precluded his suit. 398 N.E.2d at 680. *Cf.* Annot., 47 A.L.R. Fed. 15 (1980), which notes that the federal courts are divided on whether state administrative remedies must be exhausted before institution of a federal § 1983 action.

[94]264 Ind. 345, 344 N.E.2d 846 (1976).

[95]303 U.S. 41 (1938), *cited in* 264 Ind. at 353, 344 N.E.2d at 851.

[96]303 U.S. at 51-52.

found by the agency, and the other criteria for not requiring exhaustion are met,[97] exhaustion should not be required. The issue is not really one of review of agency action but of determining whether the agency may act at all.

The administrative agency in *Indiana Environmental Management Board v. Indiana-Kentucky Electric Corp.*[98] urged that the failure of the utility to apply for a variance from environmental regulations was a failure to exhaust administrative remedies which deprived the trial court of jurisdiction to review the validity of the regulations. The court of appeals rejected the argument because the statute which authorized variances from administrative regulations[99] did not provide for meaningful review of the validity issue. One need not seek a variance when the basic issue is validity of the legislation or regulation.[100]

In *Reidenbach v. Board of School Trustees*,[101] a non-tenure teacher instituted a grievance procedure after his allegedly wrongful termination in mid-year. Prior to the decision in an arbitration proceeding on the propriety of the termination, the school board notified the teacher that his contract would not be renewed for the coming school year. The arbitrator found that the teacher had indeed been wrongfully terminated. When the teacher presented himself for employment at the beginning of the new school year, the board refused to employ him, following which he instituted suit for wrongful refusal to renew his contract.

The collective bargaining agreement in effect at the time provided grievance procedures to which resort "may" be had in the event of non-renewal of a non-tenure teacher but which the teacher in *Reidenbach* had failed to follow. Specifically, he had failed to request an enumeration of the reasons for non-renewal. The court rejected his argument that the use of "may" gave him the option of following the grievance procedure or seeking immediate judicial relief. The use of "may" was interpreted as giving the complainant a choice between following the procedure or abandoning the claim.[102]

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[97][A] court should consider the following factors: the character of the question presented, *i.e.*, whether the question is one of law or fact; the adequacy or competence of the available administrative channels to answer the question presented; the extent or imminence of harm to the plaintiff if required to pursue administrative remedies, and; the potential disruptive effect which judicial intervention might have on the administrative process.

Wilson v. Review Bd., 385 N.E.2d 438, 441 (Ind. 1979).

[98]393 N.E.2d 213 (Ind. Ct. App. 1979).

[99]IND. CODE § 13-7-7-6 (1976). The court also noted that this was a rule-making procedure not covered by the Administrative Adjudication Act. 393 N.E.2d at 217-18.

[100]393 N.E.2d at 218.

[101]398 N.E.2d 1372 (Ind. Ct. App. 1980).

[102]*Id.* at 1374.

The teacher also argued that exhaustion of his administrative remedies under the grievance procedure would have been futile in light of his wrongful termination in mid-year, as found by the arbitrator, and the notice of his non-renewal by the board. Therefore, he claimed, there would be nothing to gain by going through the formal procedure, including a request for and the filing of written reasons for non-renewal (which were not to be arbitrary or capricious), and a board executive session at which the teacher could be represented by counsel. The court responded that the reasons for the termination might very well not have been the same reasons for the non-renewal, and it was necessary to make a record of the latter reasons in order for a court to review the non-renewal decision of the board. Anything less would be premature.[103]

This result is soundly based. Since the reasons for the initial termination had already been found by the arbitrator to have been arbitrary and capricious, the board's stating the same reasons for a refusal to renew the contract probably would have resulted in the same finding. New reasons for the board's action would have to be supported by the record, which the teacher would have an opportunity to refute. In either situation, exhaustion of administrative remedies would have greatly simplified the task of the reviewing court.

Finally, on the subject of exhaustion, in *Hazelett v. Blue Cross & Blue Shield of Indiana*,[104] the court of appeals held that a medical insurance policyholder need not challenge before the Insurance Commissioner a policy provision which she claimed violated public policy. The applicable statute[105] provided only for the Commissioner's approval before the insurance company could lawfully issue policies; it did not establish any type of administrative remedy for policyholders. Therefore, the policyholder could not be required to exhaust remedies which did not exist.[106]

G. Primary Jurisdiction

In *Indiana Forge & Machine Co. v. Northern Indiana Public Service Co.*,[107] the utility's customer sought from the trial court an injunction and damages for the utility's alleged breach of contract to supply natural gas. The real thrust of the complaint, however, was that the Public Service Commission's rules and regulations, on

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[103]*Id.*

[104]400 N.E.2d 1134 (Ind. Ct. App. 1980).

[105]IND. CODE § 27-8-5-1 (1976).

[106]400 N.E.2d at 1137.

[107]396 N.E.2d 910 (Ind. Ct. App. 1979).

which the utility's emergency curtailment policy was based, were arbitrary and unreasonable.[108] The court held that the customer was not justified in by-passing procedures for complaint to the Public Service Commission even though the Commission had no power and therefore no jurisdiction to grant the requested relief. In affirming the trial court's dismissal of the action on jurisdictional grounds, the court of appeals utilized Professor Davis' analysis of the doctrine of primary jurisdiction:

> "The test is not whether some parts of the case are within the exclusive jurisdiction of the courts; the test is whether some parts of the cases are within the exclusive jurisdiction of the agency. Because of the purpose of the doctrine—to assure that the agency will not be by-passed on what is especially committed to it—and because resort to the courts is still open after the agency has acted, the doctrine applies even if the agency has no jurisdiction to grant the relief sought."[109]

Professor Davis has also explained that the doctrine of primary jurisdiction is intended to govern timing of judicial consideration of issues, not to allocate powers between agencies and courts, as is sometimes assumed incorrectly.[110] In essence, it is not that the court *could not decide* the issue presented to it, in *Indiana Forge* a breach of contract, but that there were subsidiary issues which *would be better decided* by the agency.

H. Procedural Due Process

1. Right to Hearing.—The protections of procedural due process apply when state action affects liberty or property interests, a principle reiterated by the court of appeals in *Kriss v. Brown*.[111] The plaintiff, Kriss, sought to enjoin the Indiana High School Athletic Association (IHSAA) from enforcing its order which had declared him ineligible to participate in interscholastic sports at the school to which he had transferred. The IHSAA had found, *inter alia*, that Kriss had been unduly influenced to transfer, that guardians had been appointed solely for the purpose of making him eligible at the new school, that he was still eligible to play at the school he had attended while living with his parents, and that the greater likelihood of winning an athletic scholarship to college while playing at the new school was no justification for waiving IHSAA rules.

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[108] *Id.* at 913.

[109] *Id.* (quoting 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19.07 at 39 (1958)).

[110] K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 19.01 at 436 (1976).

[111] 390 N.E.2d 193 (Ind. Ct. App. 1979).

The court reaffirmed its ruling in *Haas v. South Bend Community School Corp.*[112] that (1) the IHSAA has such impact on the schools that its action should be considered "state action" and (2) there is no constitutional right to participate in interscholastic athletics.[113] Thus, Kriss had not suffered the loss of a property interest. Kriss also contended that he had been deprived of a liberty interest by virtue of damage to his name and reputation,[114] but there was no evidence to support his claim.[115] Moreover, the court of appeals observed that Kriss did receive a hearing before the IHSAA executive committee, at which he had the opportunity to refute the charges against him and which was sufficient to satisfy the due process requirement of "some kind of hearing,"[116] regardless of his dissatisfaction with that hearing. A full, judicial-type hearing was not required.[117]

A captain in the Michigan City fire department was held to have no property interest in his captaincy in *State ex rel. Austin v. Miller*[118] because the executive order which established the hearing procedure in demotion cases was invalid.[119] In the absence of a legislative or administrative direction that a hearing be held, a hearing was not required. Therefore, the court concluded that he did not possess a right to continued employment as captain.[120]

A different result was achieved in *State ex rel. Indiana State Employees' Association v. Boehning*,[121] because the Indiana State Highway Commission Bi-Partisan Personnel Act[122] and the Professional and Technical Employees Act,[123] construed together, made plain that *cause* was the sole reason for which the complaining employees could be demoted or dismissed. Consequently, the employees had a legitimate expectation of continued employment at the ranks which they each held (in other words, a property interest) when they were notified of a choice of demotion or transfer, with

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[112]259 Ind. 515, 520, 289 N.E.2d 495, 498 (1972).

[113]*Id.* at 521, 289 N.E.2d at 498.

[114]*See* Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

[115]390 N.E.2d at 199-200.

[116]Board of Regents v. Roth, 408 U.S. at 570.

[117]390 N.E.2d at 200-01.

[118]395 N.E.2d 830 (Ind. Ct. App. 1979).

[119]*Id.* at 832. The 1977 amendments to IND. CODE § 18-1-11-3 (1976), which extended notice and hearing provisions to demotions of firefighters, were conceded not to apply in this case. 395 N.E.2d at 831.

[120]395 N.E.2d at 832. The captain had claimed that his demotion was politically motivated. *Id.* at 831. In view of the recent United States Supreme Court decision in Branti v. Finkel, 100 S.Ct. 1287 (1980), it is entirely possible that he may have stated a cause of action for deprivation of a protected property interest based on his right not to be fired for political reasons.

[121]396 N.E.2d 422 (Ind. Ct. App. 1979).

[122]IND. CODE §§ 8-13-1.5-1 to -8 (1976).

[123]IND. CODE § 8-13-1-16 (1976), is also called the "Career Act."

reduction in pay, or dismissal. They could be demoted only for cause after a due process hearing.[124]

The secretary to a superintendent of schools was found to be only an employee at will, therefore without a property interest, in *McQueeney v. Glenn*.[125] Thus, she was not entitled to a due process hearing when offered a transfer or termination after her husband was elected to the school board. Further, even if she were tenured, she would not have had a property interest in a particular position unless so declared in contract or statute, which was not the case here.[126]

In *Parker v. State*,[127] the plaintiff was held not to have been deprived of due process although he had not received a hearing prior to his mandatory retirement at age seventy. The court considered his contention that he had a property interest "doubtful at best" and concluded that even if he could prove existence of a property interest, he was not entitled to a pre-retirement hearing.[128] The cost of holding a pre-retirement hearing for each retiree would far outweigh the harm to the retiree himself.[129] However, the case was remanded to the trial court in order to permit the plaintiff to prove his allegation that the deferred retirement provision of the compulsory retirement act[130] was being administered arbitrarily and discriminatorily, in violation of the equal protection of the laws.[131]

The court of appeals ruled in *State ex rel. Dunlap v. Cross*[132] that a police officer suspended for less than ten days without a pre-suspension hearing was not deprived of a property interest and thus was not entitled to due process of law.[133] While the ultimate conclusion that the officer was not entitled to a pre-suspension hearing may have been correct, the reasoning of the court in reaching the conclusion that no property interest was involved appears to be seriously flawed.

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[124]396 N.E.2d at 428-29.

[125]400 N.E.2d 806 (Ind. Ct. App. 1980).

[126]*Id.* at 811. The plaintiff had insisted on retaining her position in the central school board office despite the apprehension of the superintendent and other board members that there might be a conflict of interest because of the plaintiff's husband's membership on the board. *Id.* at 809.

[127]400 N.E.2d 796 (Ind. Ct. App. 1980).

[128]*Id.* at 805.

[129]*Id.* at 805-06 (quoting Johnson v. Lefkowitz, 566 F.2d 866 (2d Cir. 1977), *cert. denied*, 440 U.S. 945 (1979)).

[130]IND. CODE §§ 4-15-8-2, -5 (1976).

[131]400 N.E.2d at 803-05.

[132]403 N.E.2d 885 (Ind. Ct. App. 1980).

[133]*Id.* at 888-89.

The court based its conclusion on that part of the Tenure Act[134] which provides that an officer suspended "for any period in excess of ten [10] days" may obtain judicial review of that suspension.[135] From this provision, the court concluded that there was "a protectible [sic] property interest in job tenure, promotions, demotions and suspensions, in excess of 10 days."[136] To conclude that there is no property interest merely because there is no right to appeal is a non sequitur.[137]

Unfortunately, the court completely overlooked the earlier subsection of the very same statutory provision, which expressly enumerates the reasons for termination or suspension[138] thereby in-

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[134]IND. CODE §§ 18-1-11-1 to -17 (1971) (current version at *id.* §§ 18-1-11-1 to -17 (1976 & Supp. 1980)).

[135]403 N.E.2d at 888. IND. CODE § 18-1-11-3 (1971) (current version at *id.* § 18-1-11-3(b)). The current version of IND. CODE § 18-1-11-3(b) (Supp. 1980) provides in part:

> Any member of such fire or police force who is dismissed from such force, as aforesaid, or is suspended therefrom for any period in excess of ten (10) days or reduced in grade shall have the right to appeal to the circuit court or superior court of the county in which such city is located, from such decision of dismissal or suspension or reduction in grade by said board, but shall not have the right of appeal from any other decision.

[136]403 N.E.2d at 888.

[137]This analysis finds strong support in Gerhardt v. City of Evansville, 408 N.E.2d 1308 (Ind. Ct. App. 1980), which was decided and published well after the close of the survey period (decided August 26, 1980; published October 15, 1980). The suspended police officers in *Gerhardt* challenged the constitutionality of the limitation of judicial review to only those suspensions in excess of ten days, an issue not raised in *Dunlap*. The court of appeals held the review limitation unconstitutional and expressly distinguished between a right to appeal and a property interest, stating:

> The City confuses the due process right to notice and an opportunity to be heard based upon a protected property interest with the due process right to judicial review of administrative action. The City's argument is that the appellants do not have a sufficient interest in their employment and therefore cannot challenge the constitutionality of the statute. Regardless of whether they actually have a protected property interest in their employment, the appellants here are denied the opportunity to have the trial court determine whether the Commission has acted according to the law and within its power if there is no review of the Commission's action.

Id. at 1310-11. Accordingly, the court of appeals remanded the case to the trial court for a determination whether the suspended officers had a protected property interest, the issue decided in *Dunlap*.

[138]IND. CODE § 18-1-11-3 (1971) (current version at *id.* § 18-1-11-3(a) (Supp. 1980)). The current version now provides in part:

> [E]very member of the fire and police forces . . . shall hold office or grade until they are removed by said board. They may be removed for any cause other than politics, after written notice is served upon such member . . . . On the conviction in any court of a member of the said fire or police force, . . . of any crime, or upon a finding and decision of the board that any such member has been or is guilty of neglect of duty, or of the violation of rules, or neglect

dicating unmistakably that even a suspension can be only for cause. This provision creates the required expectation of continued and uninterrupted employment which was the foundation of the property interest protected by due process.[139] The question to be answered in *Dunlap* was not whether the officer was entitled to due process—the first level of inquiry—but whether she received all the process that was due—the second level of inquiry.

The notice of suspension given the officer recited the facts on which the suspension was based.[140] At a hearing subsequent to the suspension, the officer was able to present testimony in support of her position that the suspension had been improper.[141] The Police Civil Service Commission affirmed the suspension but concluded that further disciplinary action was not necessary.[142] The court of appeals should have directed its attention to whether this procedure was sufficient, taking into consideration the various decisions of the Supreme Court of the United States[143] as well as the nature of police work in general and the specific facts of the case before it.

2. Fair Hearing.—Once it is determined that a hearing must be held, the question remains: What kind of hearing? In *City of Ander-*

> or disobedience of orders, or of incapacity, or absence without leave, or immoral conduct, or conduct injurious to the public peace or welfare or conduct unbecoming an officer, or other breach of discipline, such commissioners shall have power to punish the offending party by reprimand, forfeiture, *suspension without pay*, dismissal, or by reducing him or her to a lower grade and pay.

Id. § 18-1-11-3(a) (Supp. 1980) (emphasis added).

[139]*See* Board of Regents v. Roth, 408 U.S. 564 (1972); State *ex rel.* Warzyniak v. Grenchik, 379 N.E.2d 997 (Ind. Ct. App. 1978).

[140]403 N.E.2d at 886. The officer's brief quoted pertinent parts of the notice of suspension. *See* Brief of Appellant, *supra* note 27, at 5. The notice recited that the officer was being charged with neglect of duty because she was seen by three other officers playing pool while absent from her already short-handed shift.

[141]403 N.E.2d at 886. *See* Brief of Appellant, *supra* note 27, at 13, which described the testimony as being that the officer should remain off the job, for safety reasons, but that she could shoot pool.

[142]403 N.E.2d at 886.

[143]*See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975), in which the Supreme Court overturned an Ohio statute which authorized public school principals to suspend students for up to 10 days without a hearing either before or after the suspension. The Court held that due process required at least notice of the reasons and an explanation of the evidence supporting suspension, plus an opportunity for the student to respond and explain, possibly with no delay between the notice and the explanation and response. *Id.* at 581-82. An added element in *Dunlap*, not present in *Goss*, was the evidentiary hearing following the suspension. Also, it is likely that the qualitative analytical differences between attendance at school and police work may justify police disciplinary suspensions for short periods without a prior hearing. The analysis should have been made by the court in *Dunlap*.

son v. State ex rel. Page,[144] the court stated that "'where the dismissal of a police officer is in question a hearing before the Board of Public Works and Safety must be full and fair, before an impartial body and conducted in good faith.'"[145] Furthermore, every party must be permitted to present direct and rebuttal evidence and to conduct cross-examination.[146] Both the trial court and the court of appeals found the "hearing" provided Officer Page prior to dismissal, was seriously lacking in the rudimentary requirements of due process and was neither full nor fair.[147] No exhibits or sworn testimony had been presented at the hearing, the only "evidence" being unauthenticated reports and statements which had been presented to the board prior to the hearing in the police officer's absence, thereby denying him the right to object or cross-examine.[148] Further, after the hearing the board held a "secret" meeting attended by the police chief and two city attorneys who discussed the evidence with the board.[149] Finally, the officer had never received any notice that he was being charged with mental incapacity, nor was the psychiatric report on which the charge was based made part of the record. Nevertheless, mental incapacity was listed by the board as one of the grounds for dismissal.

The *Page* case is unusual not because the courts found the described proceedings constitutionally insufficient but because the "fair hearing" provided by the administrative agency had been so blatantly unfair.

The hearing procedure in *Addison v. Review Board of the Indiana Employment Security Division*[150] was also held to be violative of due process. The unemployment compensation proceedings were split so that the former employee who was claiming compensation testified before one referee, and the employer presented his testimony of justification to a second referee. Without ever hearing the employer's evidence, the first referee found that the employee's absences had been for illness, but still he denied the claim because the employee had failed to protect his job when he did not indicate when he would return to work. This last fact was hotly contested by the parties whose respective testimonies were in direct conflict.[151]

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[144]397 N.E.2d 615 (Ind. Ct. App. 1979).

[145]*Id.* at 619 (quoting Guido v. City of Marion, 151 Ind. App. 435, 440, 280 N.E.2d 81, 84 (1972)). The statute, IND. CODE § 18-1-11-3 (1976 & Supp. 1980), sets forth the appropriate procedure in police dismissal situations, including an administrative hearing.

[146]397 N.E.2d at 619.

[147]*Id.* at 618.

[148]*Id.* at 619-20.

[149]*Id.* at 620.

[150]397 N.E.2d 1037 (Ind. Ct. App. 1979).

[151]*Id.* at 1038-39.

The court ruled that in a case such as this, where credibility of witnesses is the determinative factor, there can be no meaningful evaluation as required by due process unless the same referee hears all the conflicting testimony. A new hearing was mandated.[152]

I. Res Judicata

Indiana now follows the modern view that principles of res judicata should apply to administrative decisions of an adjudicatory nature. In *South Bend Federation of Teachers v. National Education Association—South Bend*,[153] the facts of which are discussed earlier in this Article,[154] a prior administrative hearing had resulted in a finding that the 1972 Election Agreement stated only the earliest possible date of an election under the Agreement's terms, not the date after which the terms would no longer apply. In the current proceeding, the Federation of Teachers attempted to relitigate the expiration date issue, but the court refused to permit it. The principles of res judicata, which protect against vexatious and repetitious relitigation of decided issues, should "apply to administrative proceedings judicial in nature, unless a convincing reason is advanced why the first proceeding should not be final."[155] In this case, nothing had changed since the first administrative decision, and there was no good reason why it should be overturned.

J. Equitable Estoppel

In *Tippecanoe County Area Plan Commission v. Sheffield Developers, Inc.*,[156] the approving commission required the developer to submit its subdivision plat plan four successive times. The court found that the commission had attempted to delay approval by citing new and different reasons for disapproval each time.[157] At the fourth commission meeting, the commission claimed that the developer had failed to furnish certain information required by the applicable subdivision control ordinance, but this objection had not been raised at the third meeting. The court stated that the developer had a reasonable expectation that all defects in the plat plan would have been revealed at the third meeting so that correction of the stated defects would necessarily result in approval of the

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[152]*Id.* at 1040-41.
[153]389 N.E.2d 23 (Ind. Ct. App. 1979).
[154]*See* notes 76-77 *supra* and accompanying text.
[155]389 N.E.2d at 34-35.
[156]394 N.E.2d 176 (Ind. Ct. App. 1979).
[157]*Id.* at 184.

plat,[158] particularly in view of a statute imposing a duty on the commission to inform a developer of all reasons for negative votes.[159] Accordingly, the court held that the commissioners had misled the developer to his detriment and were estopped from relying on the defect raised at the fourth meeting which had not been raised at the third meeting.[160]

K. Mandamus

Another question in *Sheffield Developers*[161] was the propriety of the trial court's order directing the commission to approve the developer's plat. The court of appeals ruled that if the plat complied with the appropriate statutes and ordinances, as found by the trial court, it became the mandatory duty of the commission to approve and the trial court had jurisdiction to mandate that approval.[162] The court rejected the commission's argument that approval had been properly denied because the commission could not muster a sufficient number of affirmative votes to fulfill its duty. Such a position could forever deny approval of a plat which met all of the legal requirements and was entitled to approval as a matter of law.[163]

The supreme court once again enforced the rule that a court may not mandate an agency to exercise its discretion in a particular way in *State ex rel. Indiana State Board of Finance v. Marion County Superior Court, Civil Division.*[164] A crime victim had sought compensation from the Violent Crime Compensation Division which although created by statute,[165] had not been funded by the General Assembly. The lower court directed the State Finance Board and the State Budget Agency to transfer the appropriate funds. Despite the statutory mandate creating the Violent Crime Compensation Division, there was no provision allocating any funds for its operation and no statutory duty imposed on any other agency to transfer funds to it, such powers to transfer being purely discretionary. Therefore, the lower court had no authority to mandate the transfer of funds.[166]

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[158]*Id.* at 185.

[159]IND. CODE § 18-7-4-58 (1976) (current version at IND. CODE § 18-7-4-708 (Supp. 1980)).

[160]394 N.E.2d at 185.

[161]394 N.E.2d 176 (Ind. Ct. App. 1979).

[162]*Id.* at 180.

[163]*Id.* at 180-81.

[164]396 N.E.2d 340, 343 (Ind. 1979).

[165]IND. CODE §§ 16-7-3.6-1 to -20 (Supp. 1980).

[166]396 N.E.2d at 343.

L. Freedom of Information

In *Gallagher v. Marion County Victim Advocate Program, Inc.*,[167] a private corporation formed to aid crime victims brought a mandamus action to compel access under the Hughes Anti-Secrecy Act[168] to certain police reports which were made at the scene of an incident and included a description of the incident as well as names of any victims, witnesses or suspects. Until issuance of an order by the police chief which denied access, the corporation had been allowed to review the reports.[169] The basic question in the case was whether the reports were "public records" within the statutory definition: "[A]ny writing in any form necessary, under or required, or directed to be made by any statute or by any rule or regulation of any administrative body or agency . . . ."[170] Although the police handbooks distributed to all officers established the proper procedures for making the reports, the court held that the reports were not public records to be disclosed under the Act because they were not required by any rule or regulation of the police department promulgated pursuant to the rule making authority of the police chief.[171] Further, the reports were "not collected *in* the discharge of duty but *to aid* in the discharge of a duty."[172]

This reading of the statute seems unnecessarily narrow. The Act specifically provides that its provisions "shall be liberally construed with the view of carrying out the . . . declaration of public policy"[173] that "all of the citizens of this state are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the official acts of those whom the people select to represent them as public officials and employees."[174] Nevertheless, the court took the position that this liberality of construction applies only after it interprets the term "public records,"[175] which it interprets most narrowly. The logic of the dissenting opinion,[176] which interpreted "public records" to include these reports and required disclosure, is far more compelling than that of the majority.

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[167]401 N.E.2d 1362 (Ind. Ct. App. 1980).
[168]IND. CODE §§ 5-14-1-1 to -6 (1976 & Supp. 1980).
[169]401 N.E.2d at 1363.
[170]IND. CODE § 5-14-1-2 (Supp. 1980).
[171]401 N.E.2d at 1368.
[172]*Id.* (emphasis in original).
[173]IND. CODE § 5-14-1-1 (1976).
[174]*Id.*
[175]401 N.E.2d at 1364.
[176]*Id.* at 1369-72 (Chipman, J., dissenting).

M. Warrantless Administrative Inspections

The warrantless inspection of a motor vehicle dealer's titles to vehicles was upheld by the Indiana Supreme Court in *State v. Tindell.*[177] The appropriate statute provides that any dealer, as a prerequisite to the issuance of his dealer's license, consents to an inspection of the titles of vehicles being held for resale, the inspection to be conducted during reasonable business hours.[178] After stopping a truck and noting irregularities in its license and title, a police officer went to the dealer's office, requested and was permitted to examine the dealer's titles, and found several violations of law which were the basis of the information filed against the dealer.

Basing its decision on *Marshall v. Barlow's, Inc.*,[179] in which the United States Supreme Court held a warrantless search of a business premise by an agent of the Occupational Safety and Health Administration to be violative of the fourth amendment's prohibition of unreasonable searches and seizures, the trial court sustained the dealer's challenge to the inspection and to the evidence thereby obtained. The Indiana Supreme Court reversed and remanded with instructions to reinstate the prosecution.[180] *Marshall* makes specific exception to the requirement of a warrant for inspections of those industries which have a long history of government control.[181] The motor vehicle industry is one such highly regulated industry and, therefore, falls within the exception to the requirement that a warrant be obtained prior to any search.[182]

In an obvious response to the increasing use of drugs by young people, particularly in the public schools, the General Assembly has added to the statute dealing with public school student discipline and due process a new section which states that a student using a school locker has no expectation of privacy therein and that school authorities may search such a locker and its contents at any time in accordance with rules governing the school.[183] While such procedures

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[177]399 N.E.2d 746 (Ind. 1980).

[178]IND. CODE § 9-1-2-3(b) (Supp. 1980).

[179]436 U.S. 307 (1978).

[180]399 N.E.2d at 748.

[181]436 U.S. at 313.

[182]399 N.E.2d at 747-48.

[183]IND. CODE § 20-8.1-5-17 (Supp. 1980) provides:

(a) A student using a locker that is the property of a school corporation is presumed to have no expectation of privacy in that locker or its contents.

(b) A principal or other member of the administrative staff of a school designated in writing by the principal may, in accordance with the rules of the governing body of that school corporation, search such a locker and its contents at any time. The school corporation shall provide each student and each students' [sic] parents a written copy of all the rules of the governing

have been criticized as violative of the students' right to privacy and to freedom from unreasonable searches under the fourth amendment,[184] warrantless searches of students' lockers have generally been upheld by the courts.[185] The issue has not yet been decided by the United States Supreme Court, but a confrontation in that Court between the proponents of students' rights to privacy and the proponents of effective drug control in the schools can be expected.

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body at that school corporation regarding searches of such lockers and their contents.

(c) Other than a general search of lockers of all students, any search conducted under this section shall be, where possible, conducted in the presence of the student whose assigned locker is the subject of the search.

(d) A law enforcement agency having jurisdiction over the geographic area in which is located the school facility containing such a locker may, at the request of the school principal and in accordance with the rules of the governing body of that school corporation, assist the school administrators in searching such a locker and its contents.

[184]*See, e.g.*, 3 W. LAFAVE, SEARCH AND SEIZURE § 10.11 (1978); Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739 (1974).

[185]*See, e.g.*, People v. Lanthier, 5 Cal. 3d 751, 488 P.2d 625, 97 Cal. Rptr. 297 (1971); *In re* Christopher W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973); State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969), *cert. denied*, 397 U.S. 947 (1970); People v. Overton, 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969); Buss, *supra* note 184, at 739 & n.1.

III. Business Associations

PAUL J. GALANTI*

A. Securities Act Derivative Liability

Arnold v. Dirrim,[1] the most significant business associations case decided during the survey period, brings home with a vengeance the adage that "ignorance of the law is no defense." In *Arnold*, the Indiana Court of Appeals affirmed a class action judgment holding Arnold, a director of National Guaranty Corporation (NGC), derivatively liable to NGC shareholders under section 23-2-1-19(b)[2] of the Indiana Securities Act.[3]

The complaint, originally filed against NGC and its president, alleged that the plaintiffs had purchased NGC shares pursuant to a false and misleading prospectus. An amended complaint was filed that added NGC officers and directors, including Arnold, as defendants and sought permission to bring the suit as a class action on behalf of all purchasers of NGC shares after October 15, 1969.[4] The

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[1]398 N.E.2d 426 (Ind. Ct. App. 1979).

[2]IND. CODE § 23-2-1-19(b) (1971) (current version at IND. CODE § 23-2-1-19(b) (1976)). This section read as follows when the *Arnold* cause of action arose:

> Every person who directly or indirectly controls a seller liable under subsection (a) [IND. CODE § 23-2-1-19(a)], every partner, officer or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the nonseller who is so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

IND. CODE § 23-2-1-19(b) was amended in 1975 by substituting the words "seller or purchaser" for "seller" and "sale or purchase" for "sale," thus extending civil liability to purchasers as well as sellers of securities. The amendment was not material to the *Arnold* decision. 398 N.E.2d at 430 n.1. *See generally* Galanti, *Business Associations, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 33, 63 (1975) [hereinafter cited as Galanti, *1975 Survey*]. Before the 1975 amendment, IND. CODE § 23-2-1-19(b) was identical to UNIFORM SECURITIES ACT (U.L.A.) § 410(b) (Master Ed. 1978).

[3]IND. CODE §§ 23-2-1-1 to -24 (1976 & Supp. 1980). For discussions of the Indiana Securities Act *see generally* Boehm, *Federal Business Law and the Indiana Lawyer: The Impact of the Securities Law on the General Practitioner*, 48 IND. L. J. 216 (1973); Pasmas, *Securities Issuance and Regulation: The New Indiana Securities Law*, 38 IND. L. J. 38 (1962); Note, *Securities Registration Requirements in Indiana*, 3 IND. LEGAL F. 270 (1969); Doxsee, *Securities Problems in Indiana*, 17 RES GESTAE No. 9, at 6 (1973).

[4]398 N.E.2d at 430.

amended complaint alleged that sales of NGC shares after October 15, 1969, were made pursuant to a false, misleading, and inadequate prospectus in violation of Indiana Code section 23-2-1-19(a).[5] In addition, the amended complaint alleged that shares sold after the prospectus expired on October 15, 1970, were unregistered; therefore, the sale of these shares was in violation of section 23-2-1-3.[6] Arnold was held liable for sales of NGC shares during both periods.[7]

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[5]IND. CODE § 23-2-1-19(a) (1971) (currently codified at IND. CODE § 23-2-1-19(a) (1976)). Before the section was amended in 1975, it provided that:

> (a) Any person who
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> (1) offers or sells a security in violation of sections 201 [*Id.* § 23-2-1-3], 204(d) [*Id.* § 23-2-1-5(d)], 301(a) [*Id.* § 23-2-1-8(a)] or 502(b) [*Id.* § 23-2-1-14(b)]; or
>
> (2) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six per cent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security and any income received on it, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six per cent per year from the date of disposition.

Section 23-2-1-19(a) was similar but not identical to UNIFORM SECURITIES ACT (U.L.A.) § 410(a) (Master Ed. 1978). IND. CODE § 23-2-1-19(a) (1976) now provides that:

> Any person who offers, purchases or sells a security in violation of any of the provisions of this chapter, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the violation, is liable to any other party to the transaction, who did not knowingly participate in the violation or who did not have, at the time of the transaction, knowledge of the violation, who may sue either at law or in equity to rescind the transaction or to recover the consideration paid, together, in either case, with interest at eight percent (8%) per year from the date of payment, costs, and reasonable attorneys' fees, upon the tender of the security or consideration received by the person bringing the action.

Although the specific language of § 23-2-1-19(a) has changed, the same result would be reached if *Arnold* were brought today.

[6]IND. CODE § 23-2-1-3 (1976) makes it "unlawful for any person to offer or sell any security in this state unless (1) it is registered under this act [§§ 23-2-1-1 to -25] or (2) the security or transaction is exempted under section 102 [§ 23-2-1-2]." This provision is identical to UNIFORM SECURITIES ACT (U.L.A.) § 301 (Master Ed. 1978).

IND. CODE § 23-2-1-5(d) (1976) requires that "[s]o long as any offering continues, the prospectus shall be revised and brought current by the filing of an amended prospectus at least once every twelve (12) months after the registration statement becomes effective and so long as the offering is not discontinued."

[7]398 N.E.2d at 430.

Before a corporate director who is not an actual seller of securities can be held liable derivatively under section 23-2-1-19(b), the corporation or actual seller must have made a sale proscribed by section 23-2-1-19(a).[8] The trial court found that NGC's prospectus[9] was misleading, and therefore in violation of section 23-2-1-19(a),[10] because it failed to adequately disclose: (1) material transactions between NGC and a second corporation controlled by NGC's directors; (2) circumstances of the second corporation's acquisition, control, and resale of NGC shares, including how the second corporation had "created" the market price for NGC shares; (3) material transactions between NGC and a third corporation; and (4) the NGC directors' indirect ownership of NGC shares through various entities.[11]

The court of appeals agreed with the trial court's conclusion that the prospectus was inadequate and misleading[12] in omitting in-

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[8]IND. CODE § 23-2-1-19(a) (1976). Although the complaint alleged in part that NGC sold unregistered securities and the court referred to selling unregistered securities, 398 N.E.2d at 430, 435, there was no actual discussion whether such sales were in fact made. Either this point was not pursued by Arnold or, because Arnold was appealing from a negative judgment, the court concluded there were no grounds upon which he could appeal this point. A negative judgment will not be reversed unless it is contrary to law. *Id.* at 434; *see* Kroger Co. v. Haun, 379 N.E.2d 1004 (Ind. Ct. App. 1978). Furthermore, a decision of a trial court will not be disturbed as "contrary to law" unless the trial court reached a conclusion contrary to the only conclusion that can be drawn from the evidence. *See* Umbreit v. Chester B. Stem, Inc., 373 N.E.2d 1116 (Ind. Ct. App. 1978); Chaney v. Tingley, 366 N.E.2d 707 (Ind. Ct. App. 1977). *See generally* 4A B. BAGNI, L. GIDDINGS & K. STROUD, INDIANA PRACTICE, APPELLATE PROCEDURE § 107 (1979) [hereinafter cited as BAGNI, GIDDINGS & STROUD].

[9]Securities can be registered for sale under the Indiana Securities Act in two ways. Securities being offered pursuant to a registration statement filed under the federal Securities Act of 1933, § 5, 15 U.S.C. § 77e (1976), may be "registered by coordination" under IND. CODE § 23-2-1-4 (1976). Under this procedure, the primary documents filed with the Indiana Securities Commissioner are copies of the form of prospectus filed with the Securities and Exchange Commission, *id.* § 23-2-1-4(b)(1), although the Indiana Securities Commissioner may require or request other documents and information. *Id.* §§ 23-2-1-4(b)(2)-(4), (c)(2)-(5).

If the securities are not being offered pursuant to a registration statement and prospectus filed under the federal Securities Act of 1933, IND. CODE § 23-2-1-5 (1976) specifies in far more detail the information and documents which must be filed with the Indiana Securities Commissioner in a "registration by qualification." The offering in *Arnold* apparently was not subject to the Securities Act of 1933; therefore, the registration should have been in compliance with *id.* § 23-2-1-5. For a discussion of the registration requirements under the Indiana Securities Act, *see generally* authorities cited in note 3 *supra*. *See also* I, IV L. LOSS, SECURITIES REGULATION 49-61, 2222-34 (2d ed. 1961 & Supp. 1969) [hereinafter cited as LOSS]; J. MOFSKY, BLUE SKY RESTRICTIONS ON NEW BUSINESS PROMOTIONS 59-72 (1971).

[10]IND. CODE § 23-2-1-19(a) (1976).

[11]398 N.E.2d at 431.

[12]*Id.* at 433.

formation specifically required by section 23-2-1-5(b).[13] The court also found that the prospectus failed to comply with a rule of the Indiana Securities Commissioner[14] requiring a prospectus to contain information not expressly required by the Act which is necessary under the circumstances to make the prospectus not misleading.[15] Furthermore, the antifraud provision of the Indiana Securities Act prohibits the omission of material facts "necessary in order to make the statements made in the light of the circumstances under which they are made, not misleading,"[16] and section 23-2-1-19(a), as it was phrased when *Arnold* arose, specifically provided for civil liability when "material" facts were not disclosed in a sales transaction if the buyer was unaware of the omission.[17]

An omitted fact must be "material" before civil liability will be imposed under the Indiana Securities Act.[18] The Act does not, however, define the term "material."[19] The *Arnold* court, relying on *Holmes v. Bateson*,[20] concluded that the "central consideration in determining materiality is whether a reasonable investor would attach importance to the information when deciding on his course of action."[21] No Indiana authority for the appropriate test for "materiality" was cited. Although several decisions under the Indiana

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[13]IND. CODE § 23-2-1-5(b) (1976).

[14]*Id.* § 23-2-1-5(b)(1)(P) authorizes the adoption of such rules.

[15]710 IND. AD. CODE 1-2-7(d) (1979).

[16]IND. CODE § 23-2-1-12 (1976). This section, which is similar to UNIFORM SECURITIES ACT (U.L.A.) § 101 (Master Ed. 1978), in full provides:

> It is unlawful for any person in connection with the offer, sale or purchase of any security, either directly or indirectly, (1) to employ any device, scheme or artifice to defraud, or (2) to make any untrue statements of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of circumstances under which they are made, not misleading, or (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

[17]IND. CODE § 23-2-1-19(a) (1976), as it is currently worded, does not specify the particular acts which result in civil liability but rather imposes such liability for a "violation of any of the provisions of this chapter." The same standards, however would apply.

[18]The Indiana Securities Act phrases certain facts that must be contained in a prospectus in terms of materiality. *E.g.*, IND. CODE § 23-2-1-5(b)(1)(B) (1976) ("a description of any *material* interest in any *material* transaction with the issuer") (emphasis added). Of course, the seller of securities which have been registered, but were not registered at the time of the sale, will not escape liability even if all material facts are disclosed because such sales still would violate the Indiana Securities Act. *Id.* § 23-2-1-3.

[19]In fact, the definition of "fraud" and similar terms is phrased in terms of "materiality." *Id.* § 23-2-1-1(d).

[20]583 F.2d 542 (1st Cir. 1978).

[21]398 N.E.2d at 433.

Securities Act have discussed "material facts," none have specified or established any standard.[22]

The court's reliance on *Holmes* is interesting. *Holmes*, unlike *Arnold*, was not brought under a state securities act based upon the Uniform Securities Act. *Holmes* was brought under section 10(b) of the Securities Exchange Act of 1934,[23] and Securities and Exchange Commission Rule 10b-5.[24] *S & F Supply Co. v. Hunter*[25] would have been appropriate authority in *Arnold*. In *Hunter* the Utah Supreme Court construed a provision similar to section 23-2-1-19(a)[26] and concluded that "materiality" is an objective standard and that a "material fact" is "something which a buyer or seller of ordinary intelligence and prudence would think to be of some importance in determining whether to buy or sell."[27]

There is, of course, nothing amiss with using federal authority to establish the requisite standards for state securities law violations. It is particularly appropriate to use federal authority in construing a civil liability provision like section 23-2-1-19(a); section 23-2-1-19(a) is based on section 410(a)(2) of the Uniform Securities Act which is "almost identical with § 12(2) of the Securities Act of 1933."[28] It is irrelevant that *Holmes* was a section 10(b)[29] and rule 10b-5 case,[30] and not a section 12(2) case,[31] because even *Hunter*[32]

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[22]*See* Rousseff v. Dean Witter & Co., 453 F. Supp. 774 (N.D. Ind. 1978); B & T Distribs., Inc. v. Riehle, 359 N.E.2d 622 (Ind. Ct. App.), *vacated*, 266 Ind. 646, 366 N.E.2d 178 (1977); Theye v. Bates, 166 Ind. App. 652, 337 N.E.2d 837 (1975); Soft Water Utils., Inc. v. LeFevre, 159 Ind. App. 529, 308 N.E.2d 395 (1974). *Cf.* Menten v. Churchman, 112 Ind. App. 309, 42 N.E.2d 426 (1942) (representation as to future earnings of the stock held to be vital inducement in the sale of options for the stock and therefore material).

[23]15 U.S.C. § 78j(b) (1976).

[24]17 C.F.R. § 240.10b-5 (1980).

[25]527 P.2d 217 (Utah 1974).

[26]IND. CODE § 23-2-1-19(a) (1976).

[27]527 P.2d at 221. *Accord*, Lane v. Midwest Bancshares Corp., 337 F. Supp. 1200 (E.D. Ark. 1972); Allen v. Schauf, 202 Kan. 348, 449 P.2d 1010 (1969). *See also* Bradley v. Hullander, 272 S.C. 6, 249 S.E.2d 486 (1978).

[28]UNIFORM SECURITIES ACT (U.L.A.) § 410(a)(2) at 672 (Master Ed. 1978). For a comparison of section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77 *l*(2) (1976), with equitable rescission, from which it was adapted, *see generally* III, IV LOSS, *supra* note 9, at 1699-705, 1708-21, 3831-42. Section 410(a)(2) of the Uniform Act, like IND. CODE § 23-2-1-12 (1976), the general fraud provision, applies even if the security is registered, exempted, or sold in violation of registration requirements. *See* UNIFORM SECURITIES ACT (U.L.A.) § 410(a)(2) (Master Ed. 1978).

[29]*See* 15 U.S.C. § 78j(b) (1976).

[30]*See* 17 C.F.R. § 240.106.5 (1980).

[31]15 U.S.C. § 77*l*(2) (1976).

[32]527 P.2d at 221 n.10.

relied on *SEC v. Texas Gulf Sulphur Co.*,[33] the seminal rule 10b-5 decision, in positing the test of materiality. The *Arnold* court had no difficulty in determining that the omissions from the NGC prospectus were "material." These omissions were clearly facts that a reasonable investor would deem important in making an investment decision.[34]

Because the NGC shares were sold by the corporation and not by Arnold as an individual, his liability depended on the scope of section 23-2-1-19(b).[35] This provision subjects five categories of persons to derivative liability for unlawful sales of securities.[36] Arnold argued that liability could be imposed only on persons who materially aided the unlawful sale. He contended that the phrase "who materially aids in the sale," which is part of the clause imposing liability on "employees" of sellers, also applies to and modifies the clause imposing derivative liability on "every partner, officer, or director of such a seller" for unlawful sales by the seller.

Although the argument is not specious, the court of appeals was clearly correct in rejecting it and holding that directors are liable under section 23-2-1-19(b)[37] regardless of whether they materially aid the transaction unless, of course, they can sustain their statutory defense that they did not and could not reasonably have knowledge of the facts on which liability was predicated. The court noted that

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[33]401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969) 404 U.S. 1005 (1971). Of course the fortunes of *Texas Gulf* have waned in recent years, but Judge Waterman, in writing for the majority, at one point stated that a "basic test of materiality . . . is whether a *reasonable* man would attach importance . . . in determining his choice of action in the transaction in question." 401 F.2d at 849 (emphasis in original) (quoting List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir. 1965)).

The Supreme Court made it clear in TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976) that the test of materiality is a "would influence" and not a "might influence" test. In *TSC*, the Court stated that a fact is material

> if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered [sic] the "total mix" of information made available.

Id. at 449. *TSC* involved the proxy provisions of the Securities Exchange Act of 1934, but the test of materiality laid down in that case applies to all federal securities laws. *See* Alton Box Bd. Co. v. Goldman, Sachs & Co., 560 F.2d 916, 920 (8th Cir. 1977).

[34]398 N.E.2d at 433.

[35]The text of IND. CODE § 23-2-1-19(b) (1971) (current version at IND. CODE § 23-2-1-19(b) (1976)). is set forth in note 2 *supra*.

[36]IND. CODE § 23-2-1-19(b) (1976). The categories are: (1) every person who directly or indirectly controls a seller liable under *id.* § 23-2-1-19(a); (2) every partner, officer, or director of such a seller; (3) every person occupying a similar status or performing similar functions; (4) every employee of such a seller who materially aids in the sale; and (5) every broker-dealer or agent who materially aids in the sale.

[37]*Id.* § 23-2-1-19(b).

from a grammatical and punctuation standpoint the provision imposes absolute liability on directors because of their status. If the legislature had intended to make only those directors liable who materially aided the transaction it would have been a simple matter to insert the "materially aids" phrase into the director clause.[38]

Furthermore, the *Arnold* construction of section 23-2-1-19(b)[39] is logical considering the purpose of the Indiana Securities Act. The Act is intended to protect investors; this goal can best be achieved by subjecting those who control or manage the seller of securities to absolute liability. It is logical to hold those who control sellers, and thus presumably can prevent unlawful securities transactions, to a high standard to protect the investing public. It would be unreasonable, however, to hold those who are mere employees of the seller, or who are securities broker-dealers or agents, to the same high standard if they are not materially involved in the transaction because they are not in a position to control the activities of the seller.

Decisions from several other jurisdictions construing blue sky law provisions similar or identical to section 23-2-1-19(b) also have made absolute the liability of directors and officers of a corporation selling securities in violation of those acts. The *Arnold* court cited and relied on *Rzepka v. Farm Estates, Inc.*[40] and *Foelker v. Kwake*[41] in support of this proposition, and *Moerman v. Zipco, Inc.*[42] and *Mitchell v. Beard*[43] for the related proposition that employees, broker-dealers, and agents are liable only if they materially aid in the sale notwithstanding that no similar restriction applies to those in a control position.

The *Arnold* court also rejected Arnold's claim that he had established the "lack of knowledge" defense provided by section

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[38]398 N.E.2d at 433-34. The *Arnold* court does not point this out, but it is important to note that the phrase "who materially aids in the sale" appears twice in IND. CODE § 23-2-1-19(b) (1976): (1) with respect to employees of the seller; and (2) with respect to broker-dealers or agents. Thus, two of the five categories of persons subjected to liability under *id.* § 23-2-1-19(b) are qualified by a "materially aid" phrase. This is a clear indication that the legislature did not intend to qualify the three remaining categories.

[39]IND. CODE § 23-2-1-19(b) (1976).

[40]83 Mich. App. 702, 269 N.W.2d 270 (1978).

[41]279 Or. 379, 568 P.2d 1369 (1977). *Accord*, Collins v. Fitzwater, 277 Or. 401, 560 P.2d 1074 (1977); Day v. Saunders, 270 Or. 432, 528 P.2d 513 (1974); Ludwig v. Mutual Real Estate Investors, 18 Wash. App. 33, 567 P.2d 658 (1977).

[42]302 F. Supp. 439 (E.D.N.Y. 1969).

[43]256 Ark. 926, 513 S.W.2d 905 (1974). *Accord*, Alton Box Bd. Co. v. Goldman, Sachs & Co., 560 F.2d 916 (8th Cir. 1977); Rucker v. La-Co, Inc., 496 F.2d 850 (8th Cir. 1974); Labenz v. Labenz, 198 Neb. 548, 253 N.W.2d 855 (1977); Cola v. Terzano, 129 N.J. Super. 47, 322 A.2d 195 (1974), *aff'd sub nom.* Cola v. Packer, 156 N.J. Super. 77, 383 A.2d 460 (1977); McClellan v. Sundholm, 89 Wash. 2d 527, 574 P.2d 371 (1978).

23-2-1-19(b).[44] Arnold alleged that he had been misled by the assurances from NGC's president that all stock sales complied with the Indiana Securities Act.[45] However, the evidence strongly suggested that Arnold was aware of many of the transactions that were not adequately described in the NGC prospectus. In effect, Arnold was contending that although he knew of the facts, he did not know of their legal significance. In other words, he pleaded that he was "ignorant of the law."[46] The court relied on *Rzepka* and *Moerman* in holding that derivative liability is imposed on those who know the applicable facts without regard to their knowledge of the law.[47]

This is a reasonable construction of the defense provided by section 23-2-1-19(b).[48] The defense is not phrased in terms of good faith but refers to actual or constructive knowledge of *"the existence of the facts by reason of which the liability is alleged to exist."*[49] The essence of the defense is the reasonable care exercised by the defendant; although a director's sophistication and his reasonable reliance on information transmitted by an expert might be factors in determining his knowledge, "they are not the sole determinants for establishing his liability."[50]

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[44]Under IND. CODE § 23-2-1-19(b) (1976) a person charged with derivative liability can escape liability if he "sustains the burden of proof that he did not know and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist."

[45]398 N.E.2d at 434-35.

[46]*Id.* at 435.

[47]The *Arnold* court, quoting Moerman v. Zipco, Inc., 302 F. Supp. 439 (E.D.N.Y. 1969), stated:

> Nothing persuades this court that Connecticut or the drafters of the Uniform Laws intended to do away with the common law rule that ignorance of the law is no defense. The Connecticut statute provides only that ignorance of the applicable facts, after the exercise of reasonable care, is a defense. There is no suggestion that defendant's knowledge of the law is a necessary element of a cause of action.

398 N.E.2d at 435 (quoting 302 F. Supp. at 450).

[48]IND. CODE § 23-2-1-19(b) (1976).

[49]*Id.* (emphasis added). The *Arnold* court correctly declined to read a good faith defense into the statute because the legislature had not. 398 N.E.2d at 435. *See* Town of Schererville v. Vavrus, 389 N.E.2d 346, 350 (Ind. Ct. App. 1979).

[50]398 N.E.2d at 435. In effect the *Arnold* court is requiring directors and officers of corporations subject to the Indiana Securities Act to meet the same standard of care imposed by section 11(b) of the Securities Act of 1933, 15 U.S.C. § 77k(b) (1976), on directors and other signatories of registration statements filed with the SEC. *See* Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544 (E.D.N.Y. 1971); Escott v. BarChris Constr. Corp., 283 F. Supp. 643 (S.D.N.Y. 1968). *See generally* Folk, *Civil Liabilities Under the Federal Securities Acts: The BarChris Case*, 55 VA. L. REV. 1, 199 (1969); Comment, Escott v. BarChris: *How Much Diligence Is Due*, 17 U. KAN. L. REV. 651 (1969).

Arnold also correctly held that section 23-2-1-19(a)[51] does not require a plaintiff to show reliance.[52] The only burden imposed by the then applicable provision is that the plaintiff buyer not know "of the untruth or omission."[53] Although not cited, this construction is supported by *Forrestal Village, Inc. v. Graham*[54] which construed the comparable section of the District of Columbia Securities Act. Furthermore, reliance is not an element of a cause of action under section 12(2) of the Securities Act of 1933,[55] upon which the Indiana derivative liability section[56] is based.

Arnold also raised an unsuccessful statute of limitation defense. The Indiana Securities Act statute of limitations in effect at the time of the suit provided that an "[a]ction under this section shall be commenced within two [2] years after discovery by the person bringing the action of a violation of this act and not afterwards."[57] The

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[51]IND. CODE § 23-2-1-19(a) (1971) (current version at IND. CODE § 23-1-2-19(a) (1976)).

[52]398 N.E.2d at 435.

[53]IND. CODE § 23-2-1-19(b) (1971) (current version at IND. CODE § 23-2-1-19(b) (1976)). The present provision requires that a plaintiff "not knowingly participate in the violation or . . . not have, at the time of the transaction, knowledge of the violation." *Id.* § 23-2-1-19(a).

[54]551 F.2d 411 (D.C. Cir. 1977). Of course, it should be noted that the Utah Supreme Court in S & F Supply Co. v. Hunter, 527 P.2d 217, 221 (Utah 1974), observed that a state securities act could not

> fairly be understood as meaning that a buyer can naively or blindly purchase stock without concern for the truth or reasonableness of representations made, [and] then if it later develops that it would serve his interest, assert a claim of falsity of a representation about which he previously had no concern, and upon which he had placed no reliance, as a basis for avoiding his contract. This is fairly deducible from the parenthetical clause in the statute quoted above (the buyer not knowing of the untruth or omission).

However, this does not seem to impose a reliance element so much as it imposes a semblance of a duty of care on the part of the plaintiff. *See also* McGraw v. Matthaei, 388 F. Supp. 84 (E.D. Mich. 1972); Lane v. Midwest Bancshares Corp., 337 F. Supp. 1200 (E.D. Ark. 1972). *See generally* discussion of B & T Distrib. Inc. v. Riehle, 359 N.E.2d 622 (Ind. Ct. App. 1977), *rev'd*, 266 Ind. 646, 366 N.E.2d 178 (1977) in Galanti, *Business Associations, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 27, 28-35 (1978) [hereinafter cited as Galanti, *1977 Survey*].

[55]Sanders v. John Nuveen & Co., 619 F.2d 1222 (7th Cir. 1980). *See also* Johns Hopkins Univ. v. Hutton, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 416 U.S. 916 (1974). *See generally* 3A H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW §8.23 (1980 rev.); III LOSS, *supra* note 9, at 1645 n.83. Some causal connection must be shown, however, between the misleading communication and the sale. Jackson v. Oppenheim, 533 F.2d 826 (2d Cir. 1976). There is clearly such a connection when the misleading communication is in a prospectus.

[56]IND. CODE § 23-2-1-19(a) (1976).

[57]IND. CODE § 23-2-1-19(e) (1971) (current version at IND. CODE § 23-2-1-19(e) (1976)). The statute was amended in 1975 to increase the period to three years. *See generally* Galanti, *1975 Survey*, *supra* note 2, at 63. *Cf.* Rousseff v. Dean Witter & Co., 453 F. Supp. 774 (N.D. Ind. 1978) (applying the three year statute of limitations to an action brought subsequent to the enactment of the three year limitation).

court of appeals rejected his contention that the statute started running when a plaintiff "in the exercise of reasonable care should have discovered the violations."[58] Relying on the specific language of the Act, the court found that the Act does not intimate any reasonable diligence standard on the part of the plaintiff.[59]

The court also held that although the class was not certified until April 9, 1974, the filing of the amended complaint in April, 1973 tolled the statute of limitations for all members of the class.[60] Furthermore, the court rejected Arnold's contention that each member of the class was obliged to prove that he discovered the violations within two years before the amended complaint was filed.[61]

At first glance it may seem harsh to impose substantial liability on a director who has been misled by the president of a corporation into believing that the legal requirements for the sale of securities have been satisfied.[62] Arnold, however, can at least seek contribution from the remaining defendants: the last sentence of section 23-2-1-19(b) provides for "contribution as in cases of contract among the several persons so liable."[63] Thus, the liability imposed on Ar-

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[58]398 N.E.2d at 440.

[59]*Id.* The rule argued for by Arnold does obtain under the Securities Act of 1933, § 13, 15 U.S.C. § 77m (1976). *See* Johns Hopkins Univ. v. Hutton, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 416 U.S. 916 (1974). *See generally* III Loss, *supra* note 9, at 1742-43.

[60]398 N.E.2d at 439. In this respect, the court followed the position urged by Professor Moore. *See* 3B Moore's Federal Practice ¶ 23.50, at 23-434 (1980).

[61]398 N.E.2d at 440. The court recognized that a plaintiff might have to prove facts to prevent the running of the statute when a defendant raising the statute as an affirmative defense has gone forward with evidence that a claim is barred; however, the burden of pursuasion still remains on the defendant asserting the bar. *Id.* When the Dirrims' suit was certified as a class action, it was treated as a certified class action from the day the amended complaint was filed. *Id.*

[62]The Indiana General Corporation Act permits directors in satisfying their duty of care to the corporation to "rely on information, opinions, reports or statements . . . in each case prepared or presented by: (A) one (1) or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matter presented . . . ." Ind. Code § 23-1-2-11(a)(2) (Supp. 1980). This provision, however, relates to a director's general duty of care to a corporation and would not affect the express statutory liability imposed by the Act. *Id.* § 23-2-1-19(b) (1976). *See generally* discussion on the amendments to § 23-1-2-11(a) in Galanti, *1977 Survey*, *supra* note 54, at 47-50.

Attorney-directors should take note that there is authority holding that a lay-director subject to derivative liability under a state securities act has a cause of action for legal malpractice against an attorney-director who was a corporation's legal counsel. The cause of action is based on the attorney-director negligently failing to advise the corporation as to the registration requirements and liability provisions of the securities act. Collins v. Fitzwater, 277 Or. 401, 560 P.2d 1074 (1977). Moreover, the *Collins* court held that the lay-director's claim against the attorney could be assigned to the purchasers of the unregistered securities. *Id.* at 408-09, 560 P.2d at 1078.

[63]Ind. Code § 23-2-1-19(b) (1976). According to the Commissioners on Uniform

nold will theoretically be spread among all those responsible for the management, or more accurately the mismanagement, of NGC.[64]

B. Limited Partnership Liability

Plaza Realty Investors v. Bailey[65] was a diversity action decided during the survey period by the Federal District Court for the Southern District of New York.[66] It is only the second reported decision applying the Indiana Uniform Limited Partnership Act.[67]

The action was brought by Plaza against VIP Center, an Indiana limited partnership, as the maker of a promissory note, and Bailey, as the managing general partner of VIP Center. The court granted Plaza's unopposed motion for summary judgment against VIP Center[68] but dismissed the action against Bailey. The primary ground for dismissing the action against Bailey, a Florida resident who never personally appeared in New York, was that Bailey had insufficient contacts with New York to satisfy the due process clause of the United States Constitution[69] and to sustain personal jurisdiction under New York's long arm statute.[70] The court, however, did not content itself with dismissing the action on jurisdictional

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Laws, this provision is intended to act as "a safeguard to avoid the common law rule which prohibits contribution among joint tort-feasors." UNIFORM SECURITIES ACT, 7A U.L.A. 672 (Master Ed. 1978). Arnold is not completely deserving of sympathy. In a companion case, Arnold v. Dirrim, 398 N.E.2d 442 (Ind. Ct. App. 1979), an appeal from an order in a proceedings supplemental action brought to collect the $553,439.36 judgment against Arnold, the court of appeals upheld the trial court's finding that certain property transfers by Arnold to his wife, son, and a controlled corporation were fraudulent as to the plaintiffs.

[64]In addition to the securities act issues, the defendant unsuccessfully raised numerous procedural issues which are beyond the scope of this survey article.

[65]484 F. Supp. 335 (S.D.N.Y. 1979).

[66]The suit originally was commenced in a New York state court but was removed to the federal court pursuant to 28 U.S.C. §§ 1441(a), 1446 (1976). 484 F. Supp. at 338.

[67]IND. CODE §§ 23-4-2-1 to -31 (1976). The Indiana Act is based on the 1916 Uniform Limited Partnership Act and not the Revised Uniform Limited Partnership Act adopted by the Commissioners on Uniform Laws in 1976. REVISED UNIFORM LIMITED PARTNERSHIP ACT (U.L.A.) §§ 1101-1105 (Master Ed. Supp. 1980).

[68]484 F. Supp. at 338.

[69]U.S. CONST. amend. V.

[70]N.Y. CIV. PRAC. LAW § 302 (Consol.).

Neither the fact that the note was payable in New York nor that telephone calls and other interstate telephonic communications were made across state lines established sufficient contacts with the state. Although transacting business through an agent in New York would satisfy the requirements, the evidence showed that the person who negotiated the real estate transaction in New York was not acting on Bailey's behalf. The court also found that Bailey had not ratified those acts merely by becoming VIP Center's managing general partner and receiving some benefits in the form of tax savings. 484 F. Supp. at 345-48.

grounds but also made findings of fact and conclusions of law supporting a dismissal on the merits.[71]

A threshold issue in *Bailey* was what law controlled. The court decided that Indiana law would apply. A major factor in this decision was that the note itself recited that Indiana law should govern and the conflict of laws rules of New York give great deference to the intent of the parties in choice of law questions.[72] Furthermore, Indiana had numerous significant contacts with the transactions in question.[73] The same result probably would have been reached if New York law had been applied because that state has also adopted the Uniform Limited Partnership Act.[74] Furthermore, as the *Bailey* court observed, the case was one where "virtually all jurisdictions would be expected to follow general common law principles."[75] Thus, although the ruling on the merits in *Bailey* can be categorized as dictum, it is still significant because the Indiana Limited Partnership Act is based on the widely adopted Uniform Limited Partnership Act.[76]

A brief recounting of the facts in *Bailey* is necessary to understand the court's conclusion that Bailey was not personally liable on the partnership's note even though he was the general partner. The normal rule is that the general partner of a limited partnership is personally liable for partnership debts.[77] VIP Center was organized in 1973 to develop a multi-purpose real estate complex on land previously conveyed to Plaza on a sale and leaseback basis by VIP Cen-

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[71]The court undertook this seemingly unnecessary task to avoid duplication of judicial effort in the event that it was determined on appeal that the court had personal jurisdiction over Bailey. 484 F. Supp. at 348.

[72]484 F. Supp. at 348-49. *See* CBS, Inc. v. Tucker, 412 F. Supp. 1222, 1226 n.5 (S.D.N.Y. 1976).

[73]484 F. Supp. at 349. The note was made by an Indiana limited partnership; it was secured by Indiana real estate; and the documents in question were executed, delivered, and recorded in Indiana.

[74]N. Y. PARTNERSHIP LAW §§ 90-119 (Consol.).

[75]484 F. Supp. at 349 (quoting Lee v. Joseph E. Seagram & Sons, Inc., 552 F.2d 447, 451 n.3 (2d Cir. 1977)).

[76]Forty-seven states, the District of Columbia, and the Virgin Islands have limited partnership acts based on the 1916 Uniform Limited Partnership Act. 6A U.L.A. 99 (Supp. 1980).

[77]A limited partnership must have a least one general partner, IND. CODE § 23-4-2-1 (1976), who is "subject to all the restrictions and liabilities of a partner in a partnership without limited partners." *Id.* § 23-4-2-9. *See* Kitchell Corp. v. Hermansen, 8 Ariz. App. 424, 446 P.2d 934 (1968); Atlanta Warehouses, Inc. v. Housing Auth., 143 Ga. App. 588, 239 S.E.2d 387 (1977); Cummings v. Nordmark, 73 Wash. 2d 322, 438 P.2d 605 (1968). *See also* IND. CODE §§ 23-4-1-9, -15, -17, -18 (1976). *See generally* J. CRANE & A. BROMBERG, PARTNERSHIP § 26, at 150 (1968) [hereinafter cited as CRANE & BROMBERG]; H. REUSCHLEIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 264, at 436-37 (1979) [hereinafter cited as REUSCHLEIN & GREGORY].

ter's original limited partner.[78] VIP Center eventually became the owner of the improvements being constructed on the land and the lessee under the land lease with Plaza. Unfortunately, VIP Center ran out of money and defaulted on the land lease with the plaintiff and on a first mortgage on the real estate.[79]

The original general partner sought new partners[80] who would advance the funds necessary to complete the project. He found one potential general partner who in turn interested defendant Bailey's parents (the "senior Baileys") in becoming limited partners. One of Bailey's law partners conducted negotiations on behalf of the senior Baileys. Although these proved unsuccessful, they led to direct negotiations between Plaza and the senior Baileys. These negotiations eventually culminated in the senior Baileys' agreeing, on December 27, 1974, to become limited partners in VIP Center.[81]

A major issue in *Plaza Realty* was whether Plaza intended to look only to the property as security on the promissory note or whether the partners were to be personally liable on the promissory note as well. A related issue was whether Bailey was involved with VIP Center on December 27, 1974. The court concluded that Bailey was not a general partner on that date because he did not agree to become the general partner until December 30. Moreover, he did not acquire partner status until the transaction was closed on December 31, 1974.[82]

The timing of the closing was influenced by tax considerations,[83] and was somewhat complicated because the various parties in interest were located in three states.[84] The order in which the various documents were executed was critical to the ultimate outcome of the case. The promissory note in issue and other documents were

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[78]484 F. Supp. at 339.

[79]Following the default, VIP Center's interest in the leasehold was assigned to Plaza which thereby became the owner of the improvements as well as the owner of the land. *Id.*

[80]New partners could take advantage of the substantial tax losses available to the partnership. *Id.* at 339-40.

[81]*Id.* at 340-41.

[82]*Id.* at 352. Plaza was unaware of Bailey's involvement in VIP Center until after the closing. *Id.* at 342. Bailey became the general partner in return for 1% of VIP Center's tax deduction for the year 1974. He also invested $11,000 in the limited partnership. *Id.*

[83]The transaction whereby Bailey and his parents invested in VIP Center had to be completed before noon on December 31, 1974, to permit them to take advantage of VIP Center's losses on their 1974 tax returns. *Id.* at 343.

[84]The holder of the first mortgage was in New York; a trustee of Plaza, who was also a member of the law firm representing Plaza, and an Indiana attorney authorized to sign documents on behalf of Bailey were in Indiana; Bailey's law partner representing the interests of the Baileys was in Florida. *Id.* at 342-43.

signed by VIP Center's original general partner on December 30, 1974. None of these documents were exchanged, however, until the amendment to the limited partnership agreement required by the Indiana Limited Partnership Act[85] had been signed on December 31, 1974.[86] If Bailey was a general partner when the note was executed, then he would be personally liable for the entire obligation. If, however, he became a general partner *after* the note was executed, then he would be liable only to the extent of his interest in VIP Center property.[87]

The court concluded that Bailey did not become VIP Center's managing general partner until an amended limited partnership certificate specifying his status as a general partner was filed as required by section 23-4-2-25(5) of the Indiana Limited Partnership Act.[88] The filing did not occur until after the note was delivered to Plaza. The court found that although Bailey agreed on December 30 to become the general partner and the amended limited partnership agreement specifically provided that it was "to be effective as of December 30, 1974,"[89] the filing of the amendment was the controlling factor.

The result in *Plaza Realty* absolving Bailey from liability seems to be correct. The evidence indicates that Plaza intended the real estate to be the security on the promissory note. The action against Bailey was presumably taken when Plaza realized that the security was inadequate or that holding Bailey personally liable was more convenient.[90]

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[85]IND. CODE § 23-4-2-24(2)(d) (1976).

[86]484 F. Supp. at 343.

[87]IND. CODE § 23-4-1-6(2) (1976) provides that the Indiana Uniform Partnership Act, *id.* §§ 23-4-1-1 to -43, applies "to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith." *See* Horn v. Builders Supply Co., 401 S.W.2d 143 (Tex. Civ. App. 1966). IND. CODE § 23-4-1-17 (1976) in turn provides: "A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, *except that this liability shall be satisfied only out of partnership property.*" (emphasis added).

[88]IND. CODE § 23-4-2-25(5) (1976).

[89]484 F. Supp. at 343, 349. In so doing, the court summarily rejected Plaza's argument that IND. CODE § 23-4-1-17 (1976) did not apply because VIP Center was a shell, rather than a "existing partnership," and that in reality a new partnership was being formed. *Id.* at 349, 351. The court reasoned that although there was a change in VIP Center's management when Bailey became the managing general partner, the nature of the partnership business was unchanged. Furthermore, the court noted that both parties were aware that the continuity of the limited partnership was essential if the senior Baileys were to receive tax benefits from the transaction. It was to maintain this continuity that the original general partner was retained when the note to Plaza was executed. *Id.* at 351-52.

[90]VIP Center's general partner who executed the note would have been personally liable, *see* note 77 *supra*, except that as part of the overall restructuring of the project,

There is little law on the question of whether an amendment pertaining to the membership of a limited partnership becomes effective when the agreement is reached or when the amended certificate is filed. The Indiana Limited Partnership Act provides that "[a] certificate is amended . . . when . . . [an appropriate writing] is filed for record in the office of the county recorder of the county where the principal place of business of the partnership is located."[91] This provision cannot mean that a general partner, upon agreeing to join the limited partnership, will never be bound on prior partnership obligations until the amended certificate is filed. The *Plaza Realty* court acknowledged this but concluded that its result was appropriate because the amended certificate was timely filed and Bailey had not acted on behalf of the partnership before it was filed.[92] Furthermore, Plaza had not relied on Bailey's participation in the venture when it decided to convey the real estate in question.[93]

The one case the court found relevant to the issue of when an amendment to a limited partnership certificate becomes effective tangentially supported the court's result. In *Harry David Zutz Insurance, Inc. v. H.M.S. Associates, Ltd.*,[94] the court upheld service of process on a limited partnership's former general partner before an amended certificate was filed reflecting this change, even though the limited partnership had agreed that the former general partner no longer served in that capacity. The court's decision in *Zutz* was appropriate. One of the purposes for filing a limited partnership certificate is to permit creditors to determine who is involved in the partnership.[95] This purpose would be defeated if a creditor could not rely on the information in a filed certificate.[96]

Plaza Realty, however, was not the typical situation where courts have held persons acting for a "limited partnership" liable for partnership obligations after an agreement was signed but before a certificate was filed. The *Plaza Realty* court addressed the typical

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Plaza granted him a general release from liability. 484 F. Supp. at 341 n.5. Plaza appears to have made a tactical mistake in releasing the original general partner from liability or in failing to specify that as part of the arrangement the incoming managing general partner would be personally liable.

[91]IND. CODE § 23-4-2-25(5) (1976).

[92]484 F. Supp. at 351.

[93]*Id.* The court observed that Plaza had received all the consideration it had bargained for: the senior Baileys joined the partnership and transferred over a million dollars in cash and notes to VIP Center. *Id.*

[94]360 A.2d 160 (Del. Super. Ct. 1976).

[95]*See* Hoefer v. Hall, 75 N.M. 751, 411 P.2d 230 (1965).

[96]This was not a problem in *Plaza Realty*. Plaza did not appear to be particularly concerned who the general partner was, or was going to be, when the note was executed. 484 F. Supp. at 342. *Zutz* is therefore not controlling here since the parties in *Zutz* knew who was to be involved before the certificate was filed.

situation in its discussion of whether a limited partnership comes into existence at the time the partnership agreement is reached or at the time the certificate is filed.[97] The language of the 1916 version of the Uniform Limited Partnership Act is vague as to when existence commences, and the cases cited in *Plaza Realty* are generally concerned with whether a putative "limited partner" becomes a general partner when the certificate is either not filed or is not timely filed.[98] A person erroneously believing himself to be a limited partner can limit his liability even if the certificate is never filed.[99] The Revised Uniform Limited Partnership Act, approved in 1976, expressly provides that a limited partnership is formed at the time the certificate of limited partnership is filed.[100]

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[97]484 F. Supp. at 350-51. IND. CODE § 23-4-2-2(1)(b) (1976) requires the filing of a limited partnership certificate containing certain specified information. For a model limited partnership certificate see REUSCHLEIN & GREGORY, *supra* note 77, at 579-81. For a model limited partnership agreement see *id.* at 573-78. Under IND. CODE § 23-4-2-2(2) (1976), a limited partnership is formed if there has been substantial compliance in good faith with the requirements of *id.* § 23-4-2-2(1).

[98]*See, e.g.*, Peerless Mills, Inc. v. American Tel. & Tel. Co., 527 F.2d 445 (2d Cir. 1975); Ruth v. Crane, 392 F. Supp. 724 (E.D. Pa. 1975), *aff'd*, 564 F.2d 90 (3d Cir. 1977); Franklin v. Rigg, 143 Ga. App. 60, 237 S.E.2d 526 (1977). There is additional authority, including an Indiana decision, in support of the rule that failure to comply with the requirements of the Uniform Limited Partnership Act deprives the limited partner of limited liability status. *See, e.g.*, Filesi v. United States, 352 F.2d 339 (4th Cir. 1965); Bisno v. Hyde, 290 F.2d 560 (9th Cir. 1961), *cert. denied*, 368 U.S. 959 (1962); Tiburon Nat'l Bank v. Wagner, 265 Cal. App. 2d 868, 71 Cal. Rptr. 832 (1968); Arrow Petrol. Co. v. Ames, 128 Ind. App. 10, 142 N.E.2d 479 (1957); Hoefer v. Hall, 75 N.M. 751, 411 P.2d 230 (1965). *But see* United States v. Coson, 286 F.2d 453, 461-62 n.13 (9th Cir. 1961).

The Limited Partnership Act does not specify when the certificate must be filed, but it has been held that a reasonable time, determined by the circumstances of the particular case, is allowed for filing. Stowe v. Merrilees, 6 Cal. App. 2d 217, 44 P.2d 368 (1935). A late filing of a limited partnership certificate will not bar the creation of a limited partnership if the plaintiff has not been injured by the delay. Franklin v. Rigg, 143 Ga. App. 60, 237 S.E.2d 526 (1977).

[99]IND. CODE § 23-4-2-11 (1976) provides that such a person is not bound on partnership obligations when upon "ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income." *See, e.g.*, Giles v. Vette, 263 U.S. 553 (1924); Vidricksen v. Grover, 363 F.2d 372 (9th Cir. 1966); Graybar Elec. Co. v. Lowe, 11 Ariz. App. 116, 462 P.2d 413 (1969); Solomont v. Polk Dev. Co., 245 Cal. App. 2d 488, 54 Cal. Rptr. 22 (1966); Franklin v. Rigg, 143 Ga. App. 60, 237 S.E.2d 526 (1977); Gilman Paint & Varnish Co. v. Legum, 197 Md. 665, 80 A.2d 906 (1951); Rathke v. Griffith, 36 Wash. 2d 394, 218 P.2d 757 (1950).

[100]REVISED UNIFORM LIMITED PARTNERSHIP ACT (U.L.A.) § 201(b) (Supp. 1980). The *Plaza Realty* court stated that the Revised Act has not been adopted by the states. 484 F. Supp. at 350. However, the Revised Act has been adopted in Connecticut, CONN. GEN. STAT. §§ 34-9 to -38 (1979), and Wyoming, WYO. STAT. §§ 17-14-201 to -1104 (Supp. 1980). Interestingly, the Revised Act does not expressly specify when an amendment to a certificate of limited partnership becomes effective. Section 202(a) provides that the certificate is amended by filing a certificate of amendment, and section 202(e) pro-

Because the VIP Center note was a preexisting partnership obligation when Bailey became the general partner, Bailey could only be personally liable beyond his interest in the venture if he expressly or impliedly adopted the obligation. The court cited *Lucas v. Coulter*,[101] a pre-uniform act case, for this proposition. Interestingly, it did not cite *Wheat v. Hamilton*,[102] which held that although an incoming partner is not liable for the prior partnership debts without his consent, very slight testimony will suffice to establish an assumption of those debts. Arguably, a case can be made that a person who becomes a general partner of a limited partnership in a major restructuring of the partnership and who is aware that a major new partnership obligation is being incurred would be liable for that obligation unless a contrary intent is clearly shown. Admittedly, this might not be the customary practice,[103] but the customary practice seems risky. A more advisable practice would be to state expressly in the relevant documents whether the incoming general partner is, or is not, to be held personally liable for the newly incurred obligation.

The *Plaza Realty* court, convinced that Plaza did not intend to hold Bailey personally liable and looking only to the real estate as security on the note, stated that if by law Bailey was liable on the note, the court would have reformed the note and inserted an exculpatory clause relieving him from personal liability.[104] On the authority of *Pearson v. Winfield*[105] the court concluded that there

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vides that a person will not incur any liability because an amendment to a limited partnership certificate has not been filed if the amendment is filed within thirty days of the event. Therefore, the same result reached in *Plaza Realty* would presumably be reached in a jurisdiction that has adopted the Revised Act. *See generally* Hecker, *Revised Uniform Limited Partnership Act: Relationship of Firm and Its Members to Third Parties*, 27 KAN. L. REV. 1 (1978).

[101]104 Ind. 81, 3 N.E. 622 (1885). *See generally* CRANE & BROMBERG, *supra* note 77, § 88(b).

[102]53 Ind. 256 (1876).

[103]The court noted that the Indiana attorney who acted for the Baileys at the closing testified that the practice in Indiana with respect to this type of transaction was to execute the documents pertaining to the new obligation before the amendment to the certificate of limited partnership was executed and to record the amended certificate after all other documents were recorded. 484 F. Supp. at 350.

[104]484 F. Supp. at 352, 354.

[105]160 Ind. App. 613, 313 N.E.2d 95 (1974). The court distinguished Adams v. Wheeler, 122 Ind. 251, 23 N.E.2d 760 (1890), which reformed a deed wherein the drafters had inadvertantly stated that Adams assumed a debt to Wheeler, because Plaza was seeking to hold Bailey liable by operation of law as a general partner of the VIP Center. 484 F. Supp. at 353. It did, however, accept *Adams* for the proposition that where the parties have agreed that only property should stand behind a promissory note, and not the personal assets of the purchaser, an instrument which does not reflect this intention should be reformed. Most of the testimony convinced the

was a mutual mistake which justified reforming a contract differing in its written form from what was actually agreed upon by the parties.

In this respect the court seems to be correct. The intent of the parties when the agreement was reached on December 27 was that Plaza's security would be in the real estate and would not include the personal assets of the former general partner or the unknown incoming general partner. The transaction was structured to accomplish that end; it would be unjust to give Plaza a second opportunity to hold the incoming general partner personally liable. Of course, a clause in the note exculpating the incoming general partner, as the *Plaza Realty* court would have accomplished by reformation, is a far more appropriate and safer procedure to follow.

C. Franchisor Liability

A third significant case during the survey period was the decision of the United States Court of Appeals for the Seventh Circuit in *Oberlin v. Marlin American Corp.*[106] *Oberlin* involved the impact of the Lanham Trademark Act[107] on Indiana agency law. The case arose from an unsuccessful marketing effort of a portable electronic telephone designed to fit within an attache case and to operate on the same frequencies available to mobile telephone installations. The manufacturer of the device[108] gave the defendant Marlin American Corporation the exclusive right to market the attache phone in all but a few states. The agreement obligated Marlin to try to establish a sales and marketing program in its assigned territory and provided that Marlin was an "independent contractor," and not an agent of the manufacturer.[109]

Marlin established a nationwide franchising plan. As part of this plan a meeting was held in Indianapolis where a Marlin representative made a presentation praising the investment potential of an attache phone franchise. The plaintiff's husband became a franchise zone distributor of the telphones for central Indiana. When it became clear that the phone could not be successfully marketed in his territory,[110] the plaintiff's husband brought a diversity action

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court that the property was to be the only security on the note. The most favorable testimony that plaintiff could elicit was ambiguous. 484 F. Supp. at 354.

[106]596 F.2d 1322 (7th Cir. 1979).

[107]15 U.S.C. §§ 1051-1127 (1976 & Supp. III 1979).

[108]The device was made by Melabs of California which was eventually acquired by defendant S.C.M. Corporation. 596 F. 2d at 1324.

[109]*Id.*

[110]No numbers were available from Indiana Bell Telephone Company for these phones. *Id.* at 1235.

alleging that: (1) Marlin had fraudulently induced him to accept the distributorship, with the liability of defendants SCM and Melabs based on an alleged principal-agency relationship; (2) Marlin had breached the distributorship agreement; and (3) a conspiracy existed among the three defendants.[111]

Marlin was dismissed from the suit before trial for lack of personal jurisdiction. Consequently the second count, in which only Marlin was charged as a defendant, was dismissed.[112] The district court directed a verdict for Melabs and SCM on the remaining counts after the plaintiff had presented her evidence.[113] Thus, the issue on appeal was whether the plaintiff had presented sufficient evidence of an agency relationship between Marlin and the two defendants to go to the jury. The court of appeals affirmed the trial court and held that she had not presented sufficient evidence.[114]

The court initially observed that the provision in the agreement between Melabs and Marlin denominating Marlin as an independent contractor rather than an agent was of no significance.[115] Although the court cited no authority, it is well settled that in determining whether a principal/agent or employer/independent contractor relationship exists depends on what the relationship is in fact and not what the parties call it.[116] The key issue in determining the nature of the relationship is the extent of control the employer exercises over the putative agent. If the employer retains a substantial amount of control over the operation of the contracting party, the courts will determine that a principal/agent relationship exists. If, however, only minor control is retained, the employer/independent contractor

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[111]*Id.* William Oberlin died before the trial and his wife was substituted as plaintiff. *Id.*

[112]Plaintiff attempted to argue that Marlin's dismissal was error, but the court of appeals was satisfied that she had abandoned below any argument that the court had jurisdiction. Consequently, the issue was improperly raised on appeal. 596 F.2d at 1325 n.1. *See* United States v. Sanchez, 422 F.2d 1198, 1201-02 (2d Cir. 1970).

[113]596 F.2d at 1325-26. The plaintiff did not appeal from the directed verdict on the conspiracy count. *Id.* at 1325 n.2.

[114]The court, as is proper, noted that the correctness of the ruling was tested by considering only the operative facts favorable to the plaintiff, disregarding conflicting unfavorable testimony and drawing all inferences most strongly in her favor. *Id.* at 1326. *See* Gunning v. Cooley, 281 U.S. 90 (1930); Hohmann v. Packard Instrument Co., 471 F.2d 815 (7th Cir. 1973); Kish v. Norfolk & W. Ry., 426 F.2d 1132 (7th Cir. 1970). *See generally* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2536 (1971) [hereinafter cited as WRIGHT & MILLER].

[115]596 F.2d at 1326.

[116]*See* Bartels v. Birmingham, 332 U.S. 126 (1947); Bond v. Harrel, 13 Wis. 2d 369, 108 N.W.2d 552 (1961). *See generally* W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 84C (1964) [hereinafter cited as SEAVEY].

status obtains. This status insulates the employer from liability to third parties except in certain circumstances.[117]

Typically, the issue of whether a party to an agreement is an independent contractor arises when an injured worker is attempting to hold the employer of his employer liable for a bodily injury.[118] An independent contractor, however, also can be an agent of the employer and even bind him by unauthorized representations and contracts.[119] This status, however, also depends on the degree of control exercised over the work done.[120] Thus, to a considerable extent the *Oberlin* court's distinction between the principal/agent and employer/independent contractor status was not accurate. The court should have been deciding in terms of agent or non-agent independent contractors. The ultimate issue, however, would be the same: did Melabs or SCM control Marlin's work.

Oberlin contended that the defendants had the requisite degree of control because the marketing agreement gave Melabs the right to approve all contract forms used by Marlin and required uniform terms, conditions, and prices to be offered to ultimate distributors.[121] The court rightly rejected the contention that control of contract forms makes a distributor an agent.[122] The control that defeats independent contractor status is control over the means by which the activities contracted for are to be accomplished and not control over mere incidental or peripheral matters. Melabs' control over forms and contracts was incidental to the main effort of Marlin's obligation to develop the franchise program.

Oberlin also argued that the provision in the marketing agreement that distributorships established by Marlin would be transferred to Melabs in the event of Marlin's default or bankruptcy

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[117]*See* Prest-O-Lite Co. v. Skeel, 182 Ind. 593, 106 N.E. 365 (1914); Curl v. Bethlehem Steel Corp., 390 N.E.2d 709 (Ind. Ct. App. 1979); Cummings v. Hoosier Marine Properties, Inc., 363 N.E.2d 1266 (Ind. Ct. App. 1977); Burkett v. Crulo Trucking Co., 355 N.E.2d 253 (Ind. Ct. App. 1976); Hale v. Peabody Coal Co., 168 Ind. App. 336, 343 N.E.2d 316 (1976). *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 2(3), 214, 220, 250, 251 (1958); RESTATEMENT (SECOND) OF TORTS §§ 409-429 (1965); REUSCHLEIN & GREGORY, *supra* note 77, § 51; SEAVEY, *supra* note 116, §§ 6B, 84C; W. SELL, AGENCY §§ 19, 95, at 86 (1975) [hereinafter cited as SELL].

[118]*See* note 117 *supra.*

[119]*See generally* SEAVEY, *supra* note 116, at 8; SELL, *supra* note 117, at 16.

[120]*See* Automatic Canteen Co. of America v. State Bd. of Equalization, 238 Cal. App. 2d 372, 47 Cal. Rptr. 848 (1965); Dumas v. Lloyd, 6 Ill. App. 3d 1026, 286 N.E.2d 566 (1972); Kablitz v. Hoeft, 25 Wis. 2d 518, 131 N.W.2d 346 (1964).

[121]596 F.2d at 1326.

[122]Smith v. Cities Serv. Oil Co., 346 F.2d 349 (7th Cir. 1965); Hancock v. Minneapolis-Moline, Inc., 482 P.2d 426 (Colo. Ct. App. 1971); Burkhalter v. Ford Motor Co., 29 Ga. App. 592, 116 S.E. 333 (1923); Coe v. Esau, 377 P.2d 815 (Okla. 1963). *See generally* SEAVEY, *supra* note 116, § 84, at 145.

demonstrated the necessary control. This, too, was rejected because the provisions applied only in the extraordinary circumstances of bankruptcy or default.[123]

The plaintiff's third major argument, although rejected by the court, was based on an intriguing theory. She argued that Melabs exercised control over Marlin's operations because it had approval rights over the use of the SCM trademark in advertising materials.[124] The Lanham Trademark Act requires the owner of a registered trademark to supervise a licensee's operations and subjects the owner to the loss of the trademark for failure to exercise such control.[125] The *Oberlin* court, however, held that this obligation is designed to ensure the integrity of the trademark and prevent its use to deceive the public as to the quality of the goods or services bearing the name.[126] The theory that the control a trademark owner must exercise over a licensee constitutes "control" for purposes of agency law is intriguing, but it is doubtful that Congress intended to make every trademark licensor a "principal" under state agency law when it adopted the Lanham Trademark Act.[127] Furthermore, the duty of supervision is narrowly limited to ensure the integrity of a registered trademark. This supervision, in and of itself, does not establish the degree of control over day-to-day operations necessary to support a conclusion that the licensor is exercising the control of a principal.[128]

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[123]596 F.2d at 1326. *See* Western Adjustment & Inspection Co. v. Gross Income Tax Div., 236 Ind. 639, 142 N.E.2d 630 (1957); Gross Income Tax Div. v. Fort Pitt Bridge Works, 227 Ind. 538, 86 N.E.2d 685 (1949).

[124]596 F.2d at 1326-27.

[125]15 U.S.C. §§ 1055, 1064(c), 1127 (1976). *See generally* 3, 4 CALLMAN, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES §§ 78.2, 98.3(c) (3d ed. 1969).

[126]596 F.2d at 1327. *See* Sheila's Shine Prod. Inc. v. Sheila Shine, Inc., 486 F.2d 114 (5th Cir. 1973); Turner v. HMH Publishing Co., 380 F.2d 224 (5th Cir.), *cert. denied*, 389 U.S. 1006 (1967); Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358 (2d Cir. 1959).

[127]A trademark license agreement without more does not create a fiduciary relationship between the licensor and licensee. Noel Holding Corp. v. Carvel Dari-Freeze Stores, Inc., 140 N.Y.S.2d 640 (Sup. Ct. 1955).

[128]*See* Smith v. Cities Serv. Oil Co., 346 F.2d 349 (7th Cir. 1965); McLaughlin v. Chicken Delight, Inc., 164 Conn. 317, 321 A.2d 456 (1973); Arthur Murray, Inc. v. Smith, 124 Ga. App. 51, 183 S.E.2d 66 (1971); Coe v. Esau, 377 P.2d 815 (Okla. 1963); Murphy v. Holiday Inns, Inc., 216 Va. 490, 219 S.E.2d 874 (1975). There appears to be no Indiana authority directly on point, but *Oberlin* considered Thompson Farms, Inc. v. Corno Feed Prod., 366 N.E.2d 3 (Ind. Ct. App. 1977), as bearing on the point. In *Thompson Farms*, the court held that a distributor was a mere conduit in a promotional scheme devised by the principal and hence was not liable where there was a direct contractual relationship between the principal and the ultimate purchaser of the product. *Id.* at 12-13.

The *Oberlin* court also rejected the contention that there was an "agency by estoppel" created by the use of the SCM trademark.[129] The court distinguished *Sheraton Corp. of America v. Kingsford Packing Co.*,[130] where the franchisor hotel corporation was estopped to deny the debts of the operator of a local Sheraton Inn. The estoppel in *Sheraton* was created when Sheraton knowingly permitted its trade name to be used in the course of business by the franchisee, a separate entity, without qualification or indication of separate ownership. In *Oberlin*, however, the defendants clearly maintained a distinction between themselves and Marlin. The plaintiff's reliance in *Sheraton* was reasonable and a result of the company's own business activities. This, however, was not true in *Oberlin*.[131]

D. Indiana Business Takeover Offers Act

The validity of the 1979 Indiana Business Takeover Offers Act[132] was upheld by the United States District Court for the Southern District of Indiana in *City Investing Co. v. Simcox*.[133] The complaint was filed in connection with a tender offer by a City Investing subsidiary for the shares of Stokely-Van Camp Inc., an Indiana corporation with its principal place of business in Indianapolis. The complaint sought a declaratory judgment that the Takeover Offers Act was invalid and also sought injunctive relief barring the defendants from enforcing the Act against City Investing and its subsidiary.[134] The plaintiffs contended they were denied a fair hearing before an unbiased decision maker on their tender offer because of the alleged

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[129]596 F.2d at 1327 n.5.

[130]162 Ind. App. 470, 319 N.E.2d 852 (1974).

[131]Various evidentiary points were raised in *Oberlin*, but with one exception these are beyond the scope of this survey. The exception was the court's statement that an agent's extrajudicial statement about a purported agency made while not in the presence of the alleged principal are inadmissible to establish the relationship in the absence of substantial independent evidence of the agency. 596 F.2d at 1328. *See* Phenix Ins. Co. v. Jacobs, 23 Ind. App. 509, 55 N.E. 778 (1899). This is a well settled rule, *see generally* SELL, *supra* note 117, at 26 n.16, that is essential to avoid subjecting enterprises to agency liability merely on the statement of a putative agent.

[132]IND. CODE §§ 23-2-3.1-1 to -11 (Supp. 1980). The Act is discussed in Galanti, *Corporations, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 133, 161-72 (1980) [hereinafter cited as Galanti, *1979 Survey*]. The earlier Indiana Business Takeover Act, IND. CODE §§ 23-2-3-1 to -12 (1976), was repealed by Act of Mar. 9, 1978, Pub. L. No. 2, § 2251, 1978 Ind. Acts 2 when the new Indiana Business Takeover Offers Act was adopted in 1979.

[133]476 F. Supp. 112 (S.D. Ind. 1979).

[134]*Id.* at 113. The defendants were the Indiana Secretary of State, the Indiana Securities Commissioner, the Indiana Attorney General, and Stokely-Van Camp, Inc. as an intervenor. The complaint also sought money damages in an unspecified amount, but that claim was stricken by the court. *Id.*

prejudgment of the case by the Indiana Securities Commissioner. In addition, the plaintiffs contended that the Takeover Offers Act violated the supremacy[135] and commerce clauses[136] of the United States Constitution both on its face and as applied to the plaintiffs.[137]

The facts and chronology of the tactical moves that resulted in the reported decision are somewhat complex. The initial legal move occurred on May 22, 1979, when the Indiana Securities Commissioner, as authorized by the Takeover Offers Act,[138] issued an order directing the plaintiffs to cease and desist from purchasing Stokely shares until they had complied with the Act and the antifraud provisions of the Indiana Securities Act.[139] The order provided for a prompt hearing upon request of the plaintiffs. Simultaneously, the State of Indiana instituted an action for injunctive relief in the Marion County Superior Court and obtained a temporary restraining order barring the plaintiffs from making further purchases.[140] On June 1, 1979, the plaintiffs filed the instant suit in federal court and moved in the superior court to dissolve the temporary restraining order and the Commissioner's cease and desist order and to dismiss the state's complaint. Following an evidentiary hearing on June 4, 1979, the superior court denied the plaintiff's motion and also denied the state's motion for a preliminary injunction.[141] Prior to the June 15, 1979 hearing ordered by the Securities Commissioner to consider the merits of his May 22 cease and desist order, the plaintiffs, as the defendants in the superior court proceeding, filed an answer and counterclaim demanding an injunction against being penalized for failure to comply with "the unconstitutional provisions of the Takeover Act."[142]

Following his hearing, the Securities Commissioner issued an order on June 19, 1979, wherein he determined that the plaintiffs had intentionally disseminated false and misleading statements regarding their intentions in violation of the antifraud provision of

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[135]U.S. CONST. art. VI, cl. 2.

[136]*Id.* art. I, §8, cl. 3.

[137]476 F. Supp. at 113-14. The claim of unconstitutionality as applied to the plaintiffs was withdrawn in open court. *Id.* at 114.

[138]IND. CODE § 23-2-3.1-10(a) (Supp. 1980).

[139]*Id.* § 23-2-1-12 (1976).

[140]476 F. Supp. at 114. This action is authorized by IND. CODE § 23-2-3.1-10(a) (Supp. 1980).

[141]476 F. Supp. at 114.

[142]*Id.* The claim was still pending when *City Investing* was decided. On emergency application to the superior court, the plaintiffs requested the June 15, 1979 hearing be prohibited. On June 14, 1979, the superior court set aside the Securities Commissioner's cease and desist order on the ground that a hearing was required before the order could be issued, but the court refused to prohibit the scheduled hearing. *Id.*

the Securities Act and that their conduct constituted a takeover offer as defined in the Takeover Offers Act.[143] The order prohibited the plaintiffs from proceeding with the tender offer and from further acquisition of Stokely shares until they were in compliance.[144]

The plaintiffs did not prevail in the federal suit. In denying the requested relief, the *City Investing* court concluded that: (1) the Securities Commissioner was not biased or prejudiced against the plaintiffs and had conducted himself in accordance with Indiana law; (2) the defendants had neither harassed nor attempted to harass the plaintiffs; (3) the plaintiffs would not be injured if the equitable relief demanded was not granted because City Investing's subsidiary had announced that it was discontinuing purchasing Stokely shares due to the recessionary nature of the economy; (4) although the court had both personal and subject matter jurisdiction, the plaintiffs had failed to prove all legal elements of the complaint; (5) the plaintiffs had failed to prove irreparable injury because the appeal to the Indiana Court of Appeals from the Securities Commissioner's cease and desist order was an adequate remedy at law; and (6) the plaintiffs had not been deprived of due process of law.[145]

The court held, in effect, that it did not have to resolve the constitutional challenge to the Takeover Offers Act because the plaintiffs, having announced that they were not making a tender offer for the Stokely shares, lacked standing as an aggrieved offeror.[146] It also held that there was a question of state law regarding whether the acquisition of shares was a "takeover offer" within the meaning of the Act. Because resolution of this issue could dispose of the case, it was unnecessary for the court to decide the constitutionality of the Act.[147]

As is often the case, immediately after determining that it did not have to resolve the plaintiffs' challenge, the court went to the "merits" and upheld the validity of the Takeover Offers Act. It opined that the Act did not conflict with the rights of an offeror to make a

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[143]IND. CODE § 23-2-3.1-1(i) (Supp. 1980).

[144]476 F. Supp. at 115. On July 6, 1979, plaintiffs filed a notice of appeal of this order with the Indiana Court of Appeals pursuant to IND. CODE § 23-2-3.1-11 (Supp. 1980).

[145]476 F. Supp. at 115.

[146]*Id.*

[147]*Id.* at 116. The court was in effect applying the abstention doctrine of Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 52, at 218-21 (3d ed. 1976); 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4241 (1978). The court also concluded that the injunctive relief being sought by plaintiffs was barred by the federal Anti-Injunction Act, 28 U.S.C. § 2283 (1976). 476 F. Supp. at 116.

tender offer under section 14(d) of the Williams Act.[148] The court found that the Act was not an obstacle to the goals of the federal act and thus was not preempted under the supremacy clause simply because the Takeover Offers Act's provisions differed from those chosen by Congress. The court also concluded that the Takeover Offers Act did not impose an impermissible burden on interstate commerce; section 28(a) of the Securities and Exchange Act of 1934[149] purportedly gives states the right to regulate such transactions. The court, however, only reached conclusions and did not discuss to any great extent[150] the grounds for invalidating state takeover statutes raised in *Great Western United Corp. v. Kidwell.*[151] Thus, *City Investing* should not be considered to be the final and definitive statement on the validity of the Indiana Takeover Offers Act.

Furthermore, even if the Takeover Offers Act did not conflict with the Williams Act when *City Investing* was decided, it is important to note that since then the SEC has adopted tender offer rules that could well create a fatal conflict for state takeover statutes under the supremacy clause.[152] For example, SEC rule 14d-2(b)[153] requires that a tender offer commence within five business days of its public announcement. Sections 6 and 8 of the Takeover Offers Act[154] effectively delay the commencement of a tender offer for fifteen business days after a statement concerning the offer is filed with the Securities Commissioner and the target company.[155] To deem the filing of the tender offer statement with the Commissioner and the target company to *not* be a "public announcement" would do violence to the common understanding of the term, particularly if the offeror simultaneously communicates with the target company shareholders. Consequently, the Takeover Offers Act would seem to conflict with federal law and must fall under the supremacy clause.[156]

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[148]15 U.S.C. § 78n(d) (1976).

[149]*Id.* § 78bb(a).

[150]476 F. Supp. at 116.

[151]439 F. Supp. 420 (N.D. Tex. 1977), *aff'd*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds, sub. nom.* Leroy v. Great Western United Corp., 443 U.S. 173 (1979). *See generally* Galanti, *1979 Survey, supra* note 132, at 161-72; Galanti, *1977 Survey, supra* note 54, at 46-47; Galanti, *1975 Survey, supra* note 2, at 52-59.

[152]U.S. CONST. art. VI, cl. 2.

[153]17 C.F.R. § 240.14d-2(b) (1980) (effective January 7, 1980). *See also* 17 C.F.R. § 240.14d-1 to e-2 (1980). The SEC takes the position in SEC Release No. 34-16384 (Nov. 29, 1979) that Rule 14d-2(b) will preempt state takeover acts. 44 Fed. Reg. 70326, 70330 (1979).

[154]IND. CODE § 23-2-3.1-6, -8 (Supp. 1980).

[155]*Id.* §§ 23-2-3.1-3, -5.

[156]U.S. CONST. art. VI, cl.2. Of course, this would not include tender offers that are not subject to the Williams Act, but there are relatively few offers of such a nature. The Williams Act applies to tender offers for equity securities registered pursuant to

A conflict like this has been raised in other jurisdictions. In *GM Sub Corp. v. Liggett Group, Inc.*,[157] the court accorded a presumption of validity to rule 14d-2 and concluded it might conflict with the Delaware takeover act[158] requirement that an announcement of a tender offer be made 20 days before the offer becomes effective. The Delaware Supreme Court concluded that the offeror might not be able to comply with both the Williams Act and the state statute and that it was improper for the lower court to restrain the offeror from complying with the Williams Act.[159] It did, however, remand to give the target company an opportunity to show that compliance with SEC rule 14d-2 and the state statute was possible and to attack the validity of the federal rule.[160]

In *Eure v. Grand Metropolitan Ltd.*,[161] a North Carolina court ruled that the provision of the North Carolina Takeover Act[162] setting a thirty-day period for the commencement of a tender offer was unenforceable because it directly conflicted with the five-day period of rule 14d-2(b). The court held that this conflict made compliance with both regulations a "physical impossibility."[163] Although *Eure* might not stand for the proposition that state regulation of tender offers is completely prohibited, if the delay feature of state takeover acts is unenforceable, then the rest of the regulations are probably irrelevant.

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section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(*l*) (1976), which includes corporations with assets exceeding $1,000,000 and 500 shareholders. *Id.* § 78(*l*)(g)(1).

IND. CODE § 23-2-3.1-6 (Supp. 1980) permits a takeover offer to "be made" less than fifteen business days after the statement is filed with the Securities Commissioner if he so orders. This provision, however, is subject to *id.* § 23-2-3.1-8 which prohibits the purchase of or payment for shares for fifteen business days after the offer is made.

[157]415 A.2d 473 (Del. 1980).

[158]DEL. CODE ANN. tit. 8, § 203 (Supp. 1980).

[159]More accurately the court concluded that a temporary restraining order was not an abuse of discretion but that interim injunctive relief should not be continued. 415 A.2d at 477. In Wylain, Inc. v. TRE Corp., 412 A.2d 338 (Del. Ch. 1980) the court held that the Delaware Act was not preempted by the Williams Act, but *Wylain* was decided before *GM Sub. See also* Strode v. Esmark, Inc., [Current] FED. SEC. L. REP. (CCH) ¶ 97,538 (Franklin Cir. Ct., (Ky.) May 13, 1980).

[160]415 A.2d at 480. Because the jurisdiction granted in section 27 to enforce the Securities Exchange Act of 1934 is exclusively federal, 15 U.S.C. § 78aa (1976), there would seem to be some doubt as to whether a state court could pass on the validity of the SEC rule. *See, e.g.*, American Distilling Co. v. Brown, 295 N.Y. 36, 64 N.E.2d 347 (1945). *Cf.* Eure v. Grand Metropolitan Ltd., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶97,383, at 97, 529 (N.C. Super. April 18, 1980) (court declared state statute preempted by rule 14d-2(b)).

[161][1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶97,383, at 97,529 (N.C. Super. April 18, 1980).

[162]N.C. GEN. STAT. § 78B-4(a) (Supp. 1977).

[163][1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶97,383, at 97,529.

The court in *City Investing*, however, might have been justified in refusing the injunctive relief sought by the plaintiffs. In *Telvest, Inc. v. Bradshaw*,[164] the United States Court of Appeals for the Fourth Circuit held that a district court erred in temporarily enjoining the enforcement of the Virginia takeover act before deciding the constitutional challenge on the merits. Although the court of appeals imagined potential conflicts that could not be reconciled, it concluded that the trial court had not adequately considered whether the Virginia act and the Williams Act could be reconciled.[165]

The *Telvest* court did not decide whether the Virginia statute imposed an impermissible burden on interstate commerce and merely noted that such a burden would have to be shown by Televest.[166] Even if state statutes can be reconciled with the Williams Act and rule 14d-2, and conceivably the Indiana Takeover Offers Act can be reconciled if the Securities Commissioner permits a tender offer to become effective within five days of a public announcement while barring any share acquisition for a fifteen-day period, the commerce clause issue might well be the death knell of state takeover statutes. The Supreme Court in *Great Western* did recognize that states can still regulate securities transactions.[167] However, the offeror in the *GM Sub* and *Eure* cases had to file disclosure documents in Delaware, New Jersey, and North Carolina and was subject to litigation in the same three states. It is difficult to see how three states can have a legitimate interest[168] in regulating a tender offer. If they do, then it is difficult to see how they can avoid conflicting regulations which might discourage the making of tender offers, thereby placing an undue burden upon interstate commerce.

E. Consideration for Shares

The validity of a corporation's issuance of shares to a majority shareholder was upheld in *Garbe v. Excel Mold, Inc.*[169] In *Garbe*, two

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[164]618 F.2d 1029 (4th Cir. 1980).

[165]*Id.* at 1035. The *Telvest* court did not consider whether there was any conflict between the Virginia statute and rule 14d-2 but noted that the SEC concluded in SEC Release No. 34-16384 (Nov. 29, 1979), 44 Fed. Reg. 70326, that its regulations conflicted with state statutes even if the Williams Act itself was not in conflict. 618 F.2d at 1036 n.10.

[166]*Id.*

[167]443 U.S. a 182. The Court pointed out that section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a) (1976), was intended to save state blue sky laws from exemption. 443 U.S. at 182 n.13. A state blue sky law might prevent an issuer from selling securities in that particular state, but none others, whereas a state takeover act can completly stymie a tender offer in all states.

[168]*See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

[169]397 N.E.2d 296 (Ind. Ct. App. 1979).

minority shareholders challenged the issuance of shares by Excel Mold in substantial part for the difference between the fair market value of equipment conveyed to Excel Mold by the majority shareholder and the allocated value of the equipment in a purchase agreement whereby the majority shareholder acquired the equipment.[170]

The value allocated to the machinery equipment of the business in the agreement was $244,200, although it was appraised by an independent third party expert at a value of $395,800. Thus the equipment was worth $151,600 more than the amount specified in the agreement.[171] The plaintiff shareholders, who were employees of the firm, were invited to make cash investments in Excel Mold. The majority shareholder invested $5,000 in cash and assigned the equipment to Excel Mold as consideration for his shares. He received approximately 80 percent of the issued shares.[172]

The minority shareholders sued, alleging that there was no consideration for the majority shareholder's shares other than the $5,000. The only issue on appeal was whether it was contrary to law for the majority shareholder to receive shares in exchange for the difference between the fair market value of equipment conveyed to Excel Mold and the value as specified in the original purchase agreement.[173]

The *Garbe* court acknowledged that a shareholder of a closely held corporation stands in a fiduciary relationship to other shareholders and consequently must deal fairly, honestly, and openly with the corporation and the other shareholders.[174] It did, however,

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[170]*Id.* at 297. The majority shareholder had acquired the business from its former parent corporation. The majority shareholder, the vice president and general manager of the subsidiary, had acquired all the assets with borrowed funds. *Id.*

[171]*Id.*

[172]*Id.* at 298.

[173]*Id.* The court noted in passing that no gain or loss was recognized for tax purposes on the transfer of the assets to the corporation under section 351 of the Internal Revenue Code. I.R.C. § 351. The basis of the equipment to the corporation would be the allocated value rather than the fair market value. Because of the incumbrances, the shareholder's basis for his shares was zero. Upon selling the stock, however, he would be taxed on the full benefit of his bargain. 397 N.E.2d 298 n.2.

[174]The court cited Motor Dispatch, Inc. v. Buggie, 379 N.E.2d 543 (Ind. Ct. App. 1978) and Hartung v. Architects Hartung/Odle/Burke, Inc., 157 Ind. App. 546, 301 N.E.2d 240 (1973), *discussed in* Galanti, *Business Associations, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 24, 42-46 (1974). *See generally* Conway, *The New York Fiduciary Concept in Incorporated Partnerships and Joint Ventures*, 30 FORDHAM L. REV. 297 (1961); Hornstein, *Judicial Tolerance of the Incorporated Partnership*, 18 L. & CONTEMP. PROB. 435 (1953). *See also* Cressy v. Shannon Continental Corp., 378 N.E.2d 941 (Ind. Ct. App. 1978) *discussed in* Galanti, *1979 Survey*, *supra* note 132, at 150-55.

recognize that the Indiana General Corporation Act controls matters for which it specifically provides.[175] In *Garbe* the relevant provision was section 23-1-2-6(e) which provides in pertinent part, with respect to the consideration for corporate shares, that

> [t]he consideration for the issuance of shares of any corporation may be paid, in whole or in part, in money, *in other property, tangible or intangible* . . . . In the *absence of actual fraud in the transaction, the judgment of the board of directors as to the value of such property . . . shall be conclusive.*[176]

The equipment was clearly "property" valued by the board of directors of Excel Mold at $151,600. Because the record showed that plaintiffs at least acquiesced in the method of valuing the majority shareholder's shares, which was outlined to them at a board of directors meeting,[177] a conclusion of "fraud" was not inevitable. Such a conclusion would be necessary before the negative judgment could be reversed on appeal.[178] A transaction like the one in *Garbe* could be fraudulent if the property is drastically overvalued. The *Garbe* transaction, however, could not be labeled fraudulent because the appraisal establishing the value of the equipment, which was not questioned at trial, was by a disinterested expert.[179]

F. Liability of Agents

The peril of an agent who commits a tort while acting on behalf of his principal was clearly demonstrated in *Howard Dodge & Sons, Inc. v. Finn.*[180] The court of appeals in *Finn* reversed a judgment in favor of Richard Dodge, the individual defendant, who was secretary-treasurer of Dodge & Sons and remanded with instructions to enter judgment in favor of the plaintiff Finn. The action was for converting heating and air conditioning equipment furnished by Dodge & Sons as a subcontractor of Millikan. Dodge & Sons was building a new home for Finn and had delivered the equipment to the

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[175]*Accord,* Somers v. AAA Temporary Servs., Inc., 5 Ill. App. 3d 931, 284 N.E.2d 462 (1972).

[176]IND. CODE § 23-1-2-6(e) (1976) (emphasis added). For a discussion of what consideration is proper for the issuance of shares *see generally* H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS §§ 167-168 (2d ed. 1970) [hereinafter cited as HENN]; 1 G. HORNSTEIN, CORPORATION LAW & PRACTICE § 247 (1959) [hereinafter cited as HORNSTEIN].

[177]397 N.E.2d at 298-99.

[178]*See* Umbreit v. Chester B. Stem, Inc., 373 N.E.2d 1116 (Ind. Ct. App. 1978). *See generally* BAGNI, GIDDINGS & STROUD, *supra* note 8, § 107.

[179]397 N.E.2d at 299.

[180]391 N.E.2d 638 (Ind. Ct. App. 1979).

construction site and had billed Millikan for the materials and labor involved. Millikan in turn billed Finn, who paid Millikan in full for the specific items furnished by Dodge & Sons.[181]

Eventually Finn terminated the construction contract with Millikan because of various defaults. Millikan then notified Dodge & Sons of the termination. Subsequently, Richard Dodge and some employees removed some of the equipment from the job site.[182] Finn filed an action for replevin after demanding a return of the equipment and a supplemental complaint for conversion when Dodge & Sons was unable to comply. The trial court entered judgment for Finn against Dodge & Sons but refused to enter judgment against Richard Dodge. Both Dodge & Sons and Finn appealed from this judgment.

The court of appeals had no difficulty affirming the judgment against Dodge & Sons.[183] The court concluded that the evidence established that Dodge & Sons had appropriated the personal property of Finn to its own use and benefit "in exclusion and defiance of the owner's rights and under an inconsistent claim of title" and was therefore guilty of tortious conversion.[184] Finn asserted his immediate unqualified right to possession and superior claim to title on two theories: that the equipment had become fixtures to his real property, and that under the Indiana Uniform Commercial Code[185] he owned the heating and air conditioning equipment.

The court did not decide the first contention but concluded that title to the equipment had passed to Finn, despite any reservation of a security interest, when Dodge & Sons completed the physical delivery.[186] Thus, title passed to Millikan when the equipment was delivered to the construction site and in turn passed to Finn when he paid Millikan's bills specifically listing the equipment.[187] Consequently, the judgment against Dodge & Sons was proper because it converted Finn's property when it reasserted dominion over the equipment.

The court, however, reversed as to Richard Dodge and reaffirmed the long standing doctrine that an agent is personally liable for a tor-

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[181]*Id.* at 640.

[182]*Id.*

[183]The court noted that if there was sufficient evidence to support the trial court's judgment on any theory the judgment would not be disturbed. *Id. See* Devine v. Grace Constr. & Supply Co., 243 Ind. 98, 181 N.E.2d 862 (1962); Dubreuil v. Pinnick, 383 N.E.2d 420 (Ind. Ct. App. 1978); Utica Mut. Ins. Co. v. Ueding, 370 N.E.2d 373 (Ind. Ct. App. 1977); Ertle v. Radio Corp. of America, 354 N.E.2d 783 (Ind. Ct. App. 1976).

[184]391 N.E.2d at 640-41. *See* Yoder Feed Serv. v. Allied Pullets, Inc., 359 N.E.2d 602 (Ind. Ct. App. 1977); Sikora v. Barney, 138 Ind. App. 686, 207 N.E.2d 846 (1965).

[185]IND. CODE § 26-1-1-101 to -10-106 (1976).

[186]391 N.E.2d at 641. *See* IND. CODE § 26-1-2-401 (1976).

[187]391 N.E.2d at 641.

tious act performed on behalf of his principal. All relevant Indiana authority on this point is from the nineteenth century.[188] The court relied on the Indiana Supreme Court decision in *Berghoff v. McDonald*[189] holding an agent personally liable for wrongfully detaining the goods of another for his principal.

Finn and *Berghoff* are in accord with the general rule as to an agent's personal liability. As Professor Seavey points out: "An agent who innocently deals with the possession of chattels of another on account of the principal may be liable to one who is entitled to them."[190] Seavey also observes that many of the cases where an agent is held liable for converting property of another "involved the repossession of property to which the principal believes he is entitled."[191] This is exactly the *Finn* situation.

The authority cited by Seavey, for the most part, is also from the nineteenth century,[192] but the relatively recent New Hampshire Supreme Court decision in *New England Box Co. v. Gilbert*[193] also supports this proposition. In *Gilbert* the court held the officers of a corporation who disposed of chattels, which the plaintiff had purchased from the corporation, personally liable as agents.

Whether Richard Dodge was acting in good faith in repossessing the equipment is irrevelant. As Dean Sell points out, an agent's liability for conversion does not depend on bad faith, and even if he mistakenly believes the chattels are his principal's "it is immaterial how reasonable that belief may be."[194] Sell does point out that the agent's acts must seriously interfere with the rights of the third party and that the agent's mere possession of the goods is insufficient to constitute a conversion.[195] It is apparent in *Finn* that Dodge was actively involved in the repossession of the heating and air conditioning equipment.

It is not clear if reversing the judgment in favor of Richard Dodge was of great economic significance because of Dodge & Sons' liability. It might be significant, however, if there was some question as to the financial health of the corporation. Of course, if Finn

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[188]Berghoff v. McDonald, 87 Ind. 549 (1882); McNaughton v. City of Elkhart, 85 Ind. 384 (1882); Blue v. Briggs, 12 Ind. App. 105, 39 N.E. 885 (1895); Block v. Haseltine, 3 Ind. App. 491, 29 N.E. 937 (1892).

[189]87 Ind. 549 (1882).

[190]SEAVEY, *supra* note 116, § 131.

[191]*Id.*

[192]*See* Haas & Howell v. Godby, 33 Ga. App. 218, 125 S.E. 897 (1924); Warder-Bushnell & Glessner Co. v. Harris, 81 Iowa 153, 46 N.W. 859 (1890); McPartland v. Read, 93 Mass. (11 Allen) 231 (1865).

[193]100 N.H. 257, 123 A.2d 833 (1956). *See generally* HENN, *supra* note 164, § 230; 1 HORNSTEIN, *supra* note 176, § 518.

[194]*See* SELL, *supra* note 117, § 198, at 178.

[195]*Id.*

enforced the judgment against Dodge, Dodge would not be entitled to contribution from the corporation because of the general rule, as unwise as it may be, of prohibiting contribution among joint tortfeasors.[196] In addition, an agent, forced to pay damages because of his torts, cannot recover these damages from his principal.[197]

G. Corporate Officer's Authority

The court in *Morton v. E-Z Rake, Inc.*[198] affirmed a judgment that the vice president and secretary of E-Z Rake had rightfully discharged plaintiffs for cause but remanded with instructions that one of the plaintiffs was entitled to ten percent of defendant's net profits pursuant to his employment agreement.[199] The plaintiffs alleged that the officer was without authority to discharge them because discharging employees was a nondelegable duty of E-Z Rake's board of directors. The basis of this argument was the "corporate norm" as reflected in E-Z Rake's bylaws which vested the management and control of the business in the board of directors.[200] The plaintiffs also sought support for their allegations from the provision of the Indiana General Corporation Act specifying the authority of officers and agents of a corporation.[201]

The *Morton* court, however, recognized that although a board of directors is charged with control and management of a corporation's business, it may authorize officers to act on behalf of the corporation by resolution, course of dealing, acquiescence, or ratification.[202] The court did not clearly resolve whether the vice president had the

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[196]*See generally* RESTATEMENT (SECOND) OF TORTS § 886A(3) (1979); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 50 (4th ed. 1971).

[197]Duncan Hill, L.R. 8 Ex. 242 (1873). *See generally* REUSCHLEIN & GREGORY, *supra* note 77, § 89(B), at 147; SEAVEY, *supra* note 116, § 168(M). In fact, the principal may have a cause of action for indemnity against the agent. W. PROSSER, *supra* note 196, § 51.

[198]397 N.E.2d 609 (Ind. Ct. App. 1979).

[199]*Id.* at 610, 614.

[200]*Id.* at 612. Prior to 1977, section 23-1-2-11(a) of the Indiana General Corporation Act specifically provided: "The business of every corporation shall be managed by a board of directors." IND. CODE § 23-1-2-11(a) (1976). In 1977 the relevant language was amended to read: "All corporate powers shall be exercised by or under the authority of, and the business and affairs of a corporation shall be managed under the direction of, a board of directors except as may be otherwise provided in this article or the articles of incorporation." *Id.* § 23-1-2-11(a)(1) (Supp. 1980). This amendment, which was patterned on the Model Business Corporation Act, 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 35 (2d ed. 1971), is discussed in Galanti, *1977 Survey*, *supra* note 54, at 47-50.

[201]IND. CODE § 23-1-2-13 (1976).

[202]397 N.E.2d at 617. *See* Crowe v. Gary State Bank, 123 F.2d 513, 516 (7th Cir. 1941). *See generally* HENN, *supra* note 176, §§ 223-227; 1 HORNSTEIN, *supra* note 176, § 513.

authority to fire the plaintiffs because the directors had ratified the vice president's actions. They did so indirectly by confirming at a board meeting the two individuals who had been appointed to succeed the plaintiffs. The plaintiffs were given the opportunity to attend this meeting at the company's expense.[203]

One of the plaintiffs was entitled to a share of E-Z Rake's profits. If E-Z Rake intended the ten percent profit increment as just a bonus to which the plaintiff was not entitled as a matter of right, then the agreement was inartfully drawn.[204] Any construction of the agreement would be favorable to the plaintiff because the agreement was prepared by the defendant's attorney.[205] The court recognized that the incremental payment loosely could be termed a "bonus or incentive plan," but it was satisfied that the payment was as much a part of the plaintiff's regular compensation as his fixed monthly salary. Even if the employee was fired for cause during the fiscal year, there were no grounds for reforming the agreement to provide for denying the increment because the agreement did not provide for, nor anticipate, the termination of employment.[206] As the court noted, "Had E-Z Rake intended to limit the profit-sharing portion of Paligraf's compensation in the manner it now presents, the necessary provision could have easily been placed in the contract."[207]

The other plaintiff did not fare as well because he was not wrongfully discharged. He did not have an employment contract; consequently, his employment was terminable at will. He claimed, however, that he was entitled to vacation and severance pay because of one instance where a salesman upon discharge had received a sum of money which the *plaintiff* characterized as "severance pay." E-Z Rake presented evidence that the payment was for commissions due on sales. Although the plaintiff had six weeks unused vacation time, he did not present any evidence that

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[203]397 N.E.2d at 612-13. *See* State *ex rel.* Guaranty Bldg. & Loan Co. v. Wiley, 100 Ind. App. 438, 196 N.E. 153 (1935). The court refused to disturb the conclusion that the plaintiffs were fired for cause because evidence showed they were discharged for refusing to obey a direct order given by E-Z Rake's vice president and secretary. 397 N.E.2d at 613.

[204]*See* Walling v. Plymouth Mfg. Corp., 139 F.2d 178 (7th Cir. 1943), *cert. denied*, 322 U.S. 741 (1944). The court appears to have confused the plaintiffs in discussing this issue, or at least used the name of the wrong plaintiff. 397 N.E.2d at 613.

[205]*See* Colonial Mortgage Co. v. Windmiller, 376 N.E.2d 529, 531-32 (Ind. Ct. App. 1978); Mandle v. Owens, 164 Ind. App. 607, 613, 330 N.E.2d 362, 366 (1975).

[206]*See* Flynn v. Koppers Co., 567 F.2d 741 (7th Cir. 1977).

[207]397 N.E.2d at 614. The plaintiff was appealing from a negative judgment, but reversal was proper because the trial court's construction and interpretation of the employment contract was clearly contrary to the only correct interpretation that could be drawn from the evidence. *Id. See generally* BAGNI, GIDDINGS & STROUD, *supra* note 8, § 102.

vacation time could be accrued and payment made upon termination of employment.[208] The evidence on these issues was in conflict; therefore, the *Morton* court rightfully refused to disturb the trial court's judgment.

H. Partnership Status

An intriguing argument *against* partnership liability was raised and rejected in *Endsley v. Game-Show Placements, Ltd.*[209] *Endsley* affirmed a judgment against the defendant Endsley for a partnership debt to Game-Show. Endsley argued that section 23-4-1-7(4) of the Indiana Uniform Partnership Act which provides "receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business"[210] requires the *actual* receipt of money as profits before the inference of partnership can arise. The court rejected this narrow construction of the statute by noting that the language refers to the receipt of a "share" of the profits and not to the receipt of the profits.[211]

Although the word "share" does not by itself determine legislative intent, the court is clearly correct. The key in determining the existence of a partnership is the intention, deducible from the acts of the parties, to do something which in law constitutes a partnership.[212] Thus, the essential element of section 23-4-1-7(4)[213] of the Partnership Act is the parties' intent regarding the division of profits that hopefully will result from the endeavor. To construe this section otherwise would produce the anomolous result that a statute imposing liability on partners would not apply to business ventures that fail at the outset.[214]

Furthermore, section 23-4-1-7(4) only establishes that receiving a share of the profits is prima facie evidence that a person is a part-

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[208]397 N.E.2d at 614.

[209]401 N.E.2d 768 (Ind. Ct. App. 1980).

[210]IND. CODE § 23-4-1-7(4) (1976). This provision is identical to the UNIFORM PARTNERSHIP ACT (U.L.A.) § 7. The Indiana statute defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." IND. CODE § 23-4-1-6 (1976). *See generally* CRANE & BROMBERG, *supra* note 77, §§ 12-14.

[211]401 N.E.2d at 770.

[212]*See* Breinig v. Sparrow, 39 Ind. App. 455, 80 N.E. 37 (1907); Breinig v. Sparrow, 39 Ind. App. 702, 80 N.E. 40 (1907).

[213]IND. CODE § 23-4-1-7(4) (1976).

[214]401 N.E.2d at 770. Endsley also argued that Game-Show must prove that he agreed to share losses as well as profits. *Id.* This argument was summarily dismissed. The general rule, in the absence of agreement to the contrary, is that partners share losses in the same proportion as they share profits. *See* Kopka v. Yockey, 76 Ind. App. 218, 131 N.E. 828 (1921). *See* Trifunovic v. Marich, 343 N.E.2d 825 (Ind. Ct. App. 1976). *See generally* CRANE & BROMBERG, *supra* note 77, § 14e.

ner; it specifically provides that the inference of partnership "shall [not] be drawn if such profits were received"[215] for certain enumerated purposes. The court concluded that the record established Endsley was to receive a share of the profits, and that he had not rebutted the inference of partnership by showing his share was to be received as one of the excepted types of payment.[216] Although Endsley was not actively involved in the day-to-day operations of the enterprise, as was the case in *Puzich v. Pappas*,[217] the evidence showed that he in fact had acted on behalf of the partnership.[218] The court acknowledged that there was conflicting testimony but refused to reverse the trial court because the evidence did not lead solely to the conclusion that Endsley was not a partner.[219]

Finally, the court rejected Endsley's contention that the trial court had used a *present* business relationship between Endsley and his co-entrepreneur to find a partnership existed at the time of the Game-Show contract. Using a present relationship is not a proper ground for determining that a partnership existed previously. The trial court in *Endsley*, however, could not have done so because the present relationship was corporate.[220]

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[215]IND. CODE § 23-4-1-7(4) (1976). The presumption is not to be drawn where profits are received in payment:

(a) as a debt by instalment or otherwise,
(b) as wages of an employee or rent to a landlord,
(c) as an annuity to a widow or representative of a deceased partner,
(d) as interest on a loan though the amount of payment vary with the profits of the business,
(e) as the consideration for the sale of good will of a business or other property by instalments or otherwise.

Id. See Huteson v. United States, 67 F.2d 731 (7th Cir. 1933), *cert. denied*, 292 U.S. 627 (1934). *See generally* CRANE & BROMBERG, *supra* note 77, § 14A; REUSCHLEIN & GREGORY, *supra* note 77, § 178.

[216]401 N.E.2d at 770.

[217]161 Ind. App. 191, 314 N.E.2d 795 (1974), *discussed in* Galanti, *1975 Survey*, *supra* note 2, at 44-46.

[218]401 N.E.2d at 771. Apparently he borrowed capital for the enterprise and in the loan agreement stated that the business was a partnership and that the interest on the loan "will be computed on the basis of partnership return prepared and filed on behalf of [the partnership]." *Id.*

Game-Show did not argue that Endsley was a partner by estoppel under IND. CODE § 23-4-1-16 (1976). Instead, Game-Show used the loan agreement as an admission in documentary evidence to show a pattern of partnership activities. 401 N.E.2d at 771 n.3. Endsley apparently had admitted in an action upon that note that he was involved in the operation of the enterprise. *Id.* at 771.

[219]401 N.E.2d at 771-72.

[220]*Id.* at 772. The court also concluded that damages were properly determined and that Endsley had not sufficiently established that the damages had been mitigated. *Id.* at 773. *See* Jones v. Abriani, 169 Ind. App. 556, 350 N.E.2d 635 (1976); Hirsch v. Merchants Nat'l Bank, 166 Ind. App. 497, 336 N.E.2d 833 (1975).

I. Special Charter Corporation

A decision that warrants at least a passing reference is *Union Insurance Co. v. State ex rel. Indiana Department of Insurance.*[221] In *Union* the court reaffirmed the doctrine that although the legislature can regulate the conduct and relations of special charter corporations,[222] the prohibition against such corporations in the 1851 Indiana Constitution[223] invalidated legislative attempts to give Union's predecessors perpetual existence by amending the original charter.[224] The court found that increasing Union's duration from fifty years to perpetuity was tantamount to *creating* a new corporation, and therefore was repugnant to the constitution.[225]

The court also rejected Union's arguments that its contract with the state had been "impaired." The court stated that when Union's license, in other words the fifty year duration, expired, so did its special privilege.[226] Equally unsuccessful was the argument that previous litigation on the issue of Union's legitimate existence acted as res judicata to bar the present challenge.[227] Consequently, Union was no longer a valid special charter insurance company and was therefore subject to regulation by the Indiana Department of Insurance.[228]

J. Statutory Developments

The most significant statutory enactment during the survey period was section 2 of Public Law Number 160[229] which amended section 23-1-2-18 of the Indiana General Corporation Act.[230] Prior to the amendment, section 23-1-2-18 permitted only a corporation with 500 or more shareholders to lend funds to officers or directors for purposes of purchasing its shares or to sell shares to officers or directors on credit. The amendment eliminated the size requirement.

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[221]401 N.E.2d 1372 (Ind. Ct. App. 1980).

[222]City of Indianapolis v. Navin, 151 Ind. 139, 147-48, 47 N.E. 525, 527 (1898).

[223]IND. CONST. art. XI, § 13.

[224]*In re* Bank of Commerce, 153 Ind. 460, 53 N.E. 950, 55 N.E. 224 (1899), *appeal dismissed*, 189 U.S. 505 (1903).

[225]401 N.E.2d at 1377.

[226]*In re* Bank of Commerce, 153 Ind. 460, 53 N.E. 950, 55 N.E. 224 (1899), *appeal dismissed*, 189 U.S. 505 (1903).

[227]401 N.E.2d at 1377-80.

[228]IND. CODE § 27-1-3-19 (1976).

[229]Act of Sept. 1, 1980, Pub. L. No. 160, § 2, 1980 Ind. Acts 1494. Section 1 of Pub. L. No. 160 amended IND. CODE § 23-1-2-4 (1976) to require that the corporate name of all Indiana professional corporations include "Corporation," "Incorporated," "Professional Services Corporation," "Professional Corporation," or an abbreviation thereof.

[230]IND. CODE § 23-1-2-18 (Supp. 1980).

The section now permits such loans or credit sales to officers or directors of any size Indiana corporation.

To a degree, the amended provision reflects the common trend toward lessening statutory restraints on activities of corporate management to the possible detriment of shareholders.[231] It does not, however, go nearly as far in this direction as section 47 of the Model Business Corporation Act[232] which permits loans or credit assistance to any employee, including directors, if the "board of directors decides that such loan or assistance may benefit the corporation."[233] The Model Act almost gives the board carte blanche in lending corporate money to officers or directors.

Presumably the legislature intended to assist officers and directors of small closely held corporations by eliminating the numerical requirement. Assuming this was the intent, it is not certain if it will be effective. Such loans or credit sales are permitted only where the unpaid balance of loans and credit sales "made pursuant to this section does not and will not thereby exceed five per cent (5%) of the then current market value of [the corporation's] outstanding shares, or if such shares have no regularly quoted market value, five per cent (5%) of the net assets of the corporation."[234] The proviso is clearly worded in the aggregate; consequently, unless the corporation is fairly substantial, the amount of money it can lend or the number of shares it can sell on credit to any one person would be relatively small.

Section 23-1-2-18 also requires that the loan or sale be made pursuant to a plan approved by a majority of the shareholders of the corporation and a majority of the shareholders of the class of shares affected.[235] Of course, if a closely held corporation wishes to make such loans or credit sales, the chances of any objection to shareholder approval are probably minimal. The importance of compliance with this requirement, however, cannot be over emphasized. Loans or credit sales under section 23-1-2-18 are excepted from the proscription of section 23-1-10-2(e) of the General Corporation Act.[236] Section 23-1-10-2(e) makes directors who vote for or assent to loans to officers or directors jointly and severally liable to the corporation

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[231]The restriction forbidding loans to corporate officers and directors is to protect the corporation, its shareholders and creditors. Stadium Realty Corp. v. Dill, 233 Ind. 378, 119 N.E.2d 893 (1954). *See generally* Eisenberg, *The Model Business Corporation Act and the Model Business Corporation Act Annotated*, 29 BUS. LAW. 1407 (1974).

[232]1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 47 (2d ed. 1971).

[233]*Id.* § 47 at 950.

[234]IND. CODE § 23-1-2-18 (Supp. 1980).

[235]*Id.* The provision bars the corporation from delivering the share certificates until the loan is repaid or the last installment payment on the credit sale is made. *Id.*

[236]*Id.* § 23-1-10-2(e).

for the amount of the loan until it is repaid. Consequently, a loan or sale which does not comply with section 23-1-2-18 could result in personal liability on the part of the directors who voted for it.[237]

The only other noteworthy legislation in the business area was Public Law Number 186[238] which amended sections 7, 17, and 23 of the Indiana Uniform Disposition of Unclaimed Property Act.[239] The amendments provide that a business association[240] issuing securities is deemed to be the holder of those securities for purposes of the Unclaimed Property Act when they have been abandoned.[241] The amendments also relieve the issuer of liability when such securities are delivered to the Attorney General's Unclaimed Property Division of the Indiana Attorney General's office pursuant to the Act.[242] In addition, the amendments change the manner in which abandoned securities may be disposed of by the attorney general and require him to dispose of such abandoned securities within one year after the date on which they are presumed to be abandoned.[243]

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[237]*See* Stadium Realty Corp. v. Dill, 233 Ind. 378, 119 N.E.2d 893 (1954). Good faith, and even ignorance of the law, on the part of the directors would not be a defense. Maclary v. Pleasant Hills, Inc., 35 Del. Ch. 39, 109 A.2d 830 (1954).

[238]Act of Feb. 27, 1980, Pub. L. No. 186, §§ 1-3, 1980 Ind. Acts 1602.

[239]IND. CODE §§ 32-9-1-7, -17, -23 (Supp. 1980). The Indiana Uniform Disposition of Unclaimed Property Act, *id.* §§ 32-9-1-1 to -45 (1976 & Supp. 1980), is perhaps a misnomer. It is a "substantial adoption" of the major provisions of the Revised 1966 Uniform Disposition of Unclaimed Property Act, but "it contains numerous variations, omissions and additional matter." 8 U.L.A. 76 (Master Ed. 1972). The changes effected by Pub. L. No. 186 are not reflected in the Uniform Act.

[240]A business association "means any corporation, including both for profit and not-for-profit corporations, joint stock company, business trust, partnership, eleemosynary organization or cooperative association and every other association or organization of two (2) or more individuals." IND. CODE § 32-9-1-3(c) (1976).

[241]*Id.* § 32-9-1-7(3) (Supp. 1980).

[242]*Id.* § 32-9-1-17.

[243]*Id.* § 32-9-1-23.

IV. Civil Procedure and Jurisdiction

WILLIAM F. HARVEY*

A. Introduction

This survey period saw major changes in the Trial Rules by supreme court amendment. The Supreme Court of Indiana upon recommendation of the court's standing Committee on Rules of Practice and Procedure amended the following rules effective January 1, 1980: Trial Rules 5(B)(1); 59; 60; 62(B); 79(14), (15) and (16); and 80. Appellate Rules 8.1 and 8.3 and Criminal Rule 13(12) were also amended.

Each of these amended rules was supported by committee notes which explained the amendments. Several of the amendments and their notes are discussed in this Article, with particular emphasis given to Trial Rule 59 because it is a critical motion which must be made before an appeal of a final judgment or order can be made. The discussion which is presented appears as each subject area arises.

Additionally, one statutory change is discussed.[1] It provides for the payment of interest on a judgment rendered against a governmental entity measured from the date of settlement or judgment if the judgment remains unpaid 180 days after settlement or judgment.

B. Jurisdiction, Process, Venue, Standing, and Claims in General

1. Jurisdiction.—Two cases decided by the United States Supreme Court during this survey period are extraordinarily important. Factually, they relate (a) to products liability litigation, and (b) to the acquisition of jurisdiction by a method known as "quasi-in-rem" judicial power.

Their conceptual bases, however, are much broader than those factual patterns, and the cases deserve careful attention. They appear to hold that (a) an adequate association or contact must exist between the defendant and the state or forum which asserts judicial power over the defendant, *and* (b) an adequate association or contact must exist between the "litigation facts" and the state or forum which asserts jurisdiction or judicial power to render judgment on

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[1]Act of Mar. 3, 1980, Pub. L. No. 198, 1980 Ind. Acts 1630 (amending IND. CODE § 34-4-16.5-17 (1976)). *See* note 77 *infra* and accompanying text.

those facts. "Litigation facts" may be defined as those facts which form the basis of the claim asserted by the plaintiff against the defendant; this does not refer to any particular theory of action which those facts might generate. The main thought is that the "litigation facts" must also have an association with the jurisdictional court in addition to the defendant's association. Of course, there must also be adequate service of process or notice of the action.

In *World-Wide Volkswagen Corp. v. Woodson*,[2] a claim arose from an automobile accident which occurred in the state of Oklahoma. The plaintiffs were traveling through Oklahoma when their car was struck in the rear causing its gas tank to explode. The plaintiffs brought a personal injury suit alleging a defective gas tank and fuel system and joined as defendants: (1) the automobile's manufacturer, (2) the importer for Volkswagen in the United States, (3) the regional distributor of Volkswagen, and (4) the retail dealer in New York. The regional distributor and the retail dealer entered a special appearance in the Oklahoma state court and claimed that Oklahoma's exercise of jurisdiction over them offended the due process clause of the fourteenth amendment.

The regional distributor, World-Wide, and the retail dealer, Seaway, did no business of any kind in Oklahoma. They did not ship or sell any product in Oklahoma, nor did they have an agent to receive process there. They did not purchase advertising in any media calculated to reach Oklahoma. There was no showing that any automobile sold by World-Wide or Seaway ever entered Oklahoma with the exception of the plaintiff's automobile involved in this case.

The Supreme Court of Oklahoma sustained a finding of personal jurisdiction over the defendants upon the statutory basis that an Oklahoma "court may exercise personal jurisdiction over a person . . . causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed"[3] in Oklahoma. The state court did not assert jurisdiction upon the grounds that a person is subjected to Oklahoma jurisdiction when he causes tortious injury in the state by an act or omission out of the state of Oklahoma.[4] The Supreme Court of the United States granted certiorari to resolve a dispute between that state supreme court and four other state supreme court deci-

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[2]444 U.S. 286 (1980).

[3]OKLA. STAT. tit. 12, § 1701.03(a)(4) (1961), *quoted in* 444 U.S. at 290 n.7.

[4]*See* 444 U.S. at 290 n.7.

sions which were inconsistent in their interpretation of the due process clause of the fourteenth amendment.[5]

The Court reversed, holding that there was no jurisdiction in the state courts of Oklahoma.[6] Noting the familiar "contacts test," the Court stated that there was a total absence in the record of any affiliating circumstances between the moving defendants and the state of Oklahoma.[7] "[T]he fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma"[8] was insufficient to sustain the exercise of Oklahoma's jurisdiction. The Court stated that its decision was consistent with the case of *Shaffer v. Heitner*,[9] in which the Court overturned the proposition "that the interest of a creditor in a debt could be extinguished or otherwise affected by any State having transitory jurisdiction over the debtor."[10] The Court stated that the element of "foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State."[11] Rather, the Court said, "it is that the defendant's conduct and connection with the forum State are such that [the defendant] should reasonably anticipate being haled into court"[12] in the forum state. Thus the Court said that "[w]hen a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State' . . . it has clear notice that it is subject to suit there, and can act"[13] accordingly insofar as the possibility of future litigation is concerned.

There was no discussion concerning the manufacturer or the national importer of the Audi, and it appears that neither raised any question before the Supreme Court. The opinion is thus limited to the New York dealer's and the northeastern regional distributor's jurisdictional immunity from suit in Oklahoma.

The opinion is consistent with Indiana's Trial Rule 4.4,[14] and

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[5]*Id.* at 291 & n.9.

[6]*Id.* at 299.

[7]*Id.* at 295.

[8]*Id.*

[9]433 U.S. 186 (1977), *discussed in* Harvey, *Civil Procedure and Jurisdiction, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 51, 51-52 (1978) [hereinafter cited as Harvey, *1977 Survey*], *and in* Harvey, *Civil Procedure and Jurisdiction, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 57, 57-58 (1980) [hereinafter cited as Harvey, *1979 Survey*].

[10]444 U.S. at 296.

[11]*Id.* at 297.

[12]*Id.*

[13]*Id.* (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

[14]IND. R. TR. P. 4.4(A) establishes seven bases of jurisdiction for Indiana trial courts. These bases contemplate that jurisdiction over a person or entity shall arise, along with the litigation, from an act or acts done in Indiana or which impact into In-

should be carefully noted in jurisdictional questions in all types of litigation.

The case of *Rush v. Savchuk*,[15] is of major significance concerning the assertion of jurisdiction by a state court over a nonresident defendant upon a set of facts which developed outside the state in which suit is brought.

In *Rush*, a motor vehicle accident occurring in Indiana involved two Indiana residents in a single-car event. The injured plaintiff-appellee Savchuk was a passenger in the car driven by defendant-appellant Rush. The car was owned by Rush's father and was insured by State Farm Mutual Automobile Insurance Company (State Farm). Indiana's guest statute[16] would have barred a claim by the plaintiff if the action had been brought in an Indiana court.

The plaintiff moved to Minnesota in 1973, and instituted an action against Rush in the Minnesota state courts. Rush had no association with Minnesota which could justify in personam jurisdiction over him. The plaintiff attempted to assert quasi-in-rem jurisdiction by garnishing State Farm's duty under the insurance policy to defend and indemnify Rush in connection with such a suit. State Farm did considerable business in Minnesota. The defendant was served personally in Indiana.

State Farm and Rush moved to dismiss in the Minnesota trial court. The motion was denied and the Supreme Court of Minnesota affirmed the trial court's decision.[17] That decision was vacated by the United States Supreme Court,[18] and on remand the Minnesota Supreme Court determined[19] that the assertion of quasi-in-rem jurisdiction through garnishment of the insurer's obligation to an insured did not offend the due process standards enunciated in *Shaffer v. Heitner*.[20] The Minnesota Supreme Court stated[21] that its decision was supported by the rule stated in *Seider v. Roth*,[22] to the effect "that the contractual obligation of an insurance company to its insured under a liability insurance policy is a debt subject to attach-

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diana. *See* Oddi v. Mariner-Denver, Inc., 461 F. Supp. 306 (S.D. Ind. 1978) (denial of personal jurisdiction where none of the acts, bug bites in a hotel in Denver, Colorado, which formed the basis for the litigation were done or performed in Indiana).

[15]444 U.S. 320 (1980).

[16]IND. CODE § 9-3-3-1 (1976).

[17]Savchuk v. Rush, 311 Minn. 480, 245 N.W.2d 624 (1976), *vacated* 433 U.S. 902 (1977).

[18]433 U.S. 902 (1977).

[19]Savchuk v. Rush, 311 Minn. 480, 502, 272 N.W.2d 888, 891-92 (1978), *reversed*, 444 U.S. 320 (1980).

[20]433 U.S. 186 (1977). *See also* note 9 *supra*.

[21]311 Minn. at 501, 272 N.W.2d at 891.

[22]17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

ment under state law if the insurer does business in the State."[23]

The Supreme Court framed the issue in this way: "This appeal presents the question whether a State may constitutionally exercise *quasi in rem* jurisdiction over a defendant who has no forum contacts by attaching the contractual obligation of an insurer licensed to do business in the State to defend and indemnify him in connection with the suit."[24]

The Court effectively rejected the sufficiency of the *Seider* rationale, stating that "the mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction over an unrelated cause of action."[25]

The Court also noted that there was no significant contact between the forum (Minnesota), and the place where the litigation arose (Indiana), and it accorded no jurisdictional significance to the insurer's obligation to defend Rush.[26]

The gist of this holding was that there must be sufficient contacts between the forum state, the defendant, *and* the body of the litigation. In *Rush*, the facts which gave rise to the litigation, all of which occurred in Indiana, had no association with the forum state, Minnesota. Furthermore, the insurer's duty to defend the insured, and the insurer's association with the state of suit could not be attributed to the defendant, Rush. "The requirements of [*International Shoe Co. v. Washington*][27] must be met as to each defendant over whom a state court exercises jurisdiction."[28]

The case is obviously a leading decision in the entire area of jurisdiction. It does not adversely affect Indiana Trial Rule 4.4,[29] which has always required an association between the body of the litigation and the jurisdictional act which sustains the trial court's assertion of authority. It does, however, clearly affect Indiana Trial Rule 64(B)(2),[30] and if there is no other association between the in-

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[23]444 U.S. at 325.

[24]*Id.* at 322.

[25]*Id.* at 328.

[26]*Id.* at 329.

[27]326 U.S. 310 (1945).

[28]444 U.S. at 332.

[29]IND. R. TR. P. 4.4.

[30]IND. R. TR. P. 64(B) provides in part:

Attachment or attachment and garnishment shall be allowed in the following cases in addition to those where such remedies prior to judgment are now permitted by law:

(1) It shall be a cause for attachment that the defendant or one of several defendants is a foreign corporation, a nonresident of this state, or a person whose residence and whereabouts are unknown and cannot be determined after reasonable investigation before the commencement of the action.

sured, the litigation, and Indiana, it would be unconstitutional on the facts of *Rush* to assert jurisdiction over a nonresident individual solely because an insurance company licensed to do business in Indiana has a duty to defend him. The language of the rule, though, clearly permits attachment of the insurer's obligation to secure satisfaction of an otherwise valid judgment.[31]

2. Power and Duty To Entertain Complaint.—In *Colvin v. Bowen*,[32] a prison inmate brought an action in state court under 42 U.S.C. § 1983,[33] which the trial court dismissed for lack of jurisdiction. The court of appeals, however, noted that the action was brought under a federal statute for the enforcement of a civil rights claim and that the Indiana court had concurrent jurisdiction with the federal district court to rule on that claim. The court held that there was a duty to entertain a claim growing out of a valid federal statute.[34]

In another decision concerning 42 U.S.C. § 1983, *Thompson v. Medical Licensing Board*[35] (*Thompson II*), the plaintiff questioned

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(2) Any interest in tangible or intangible property owned by the defendant shall be subject to attachment or attachment and garnishment, as the case may be, if it is subject to execution, proceedings supplemental to execution or any creditor process allowed by law. Wages or salaries shall not be subject to attachment and garnishment . . . .

[31]Note, however, that the procedure under IND. R. TR. P. 64(B)(2) for attaching the insurer's duty to defend an insured is limited to the enforcement of a judgment. It would also appear to be unconstitutional, on the holding in *Rush*, to assert jurisdiction over an insur*er* solely because the insurer has a duty to defend a resident individual if there is no further association between the insured, the "litigation facts" and the state.

[32]399 N.E.2d 835 (Ind. Ct. App. 1980). The trial court had dismissed under Trial Rule 12(B)(1) and Trial Rule 12(B)(6), and the appellate court also noted that *if* the trial court was correct in dismissing for the absence of jurisdiction (which it was not) then it could not also rule upon the Trial Rule 12(B)(6) motion because such a dismissal is an assertion of the trial court's jurisdiction. 399 N.E.2d at 838.

[33]42 U.S.C.A. § 1983 (West Supp. 1980) provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See Monell v. Department of Social Serv., 436 U.S. 658 (1978) (analysis of legislative history regarding statute's application to local government and officials).

[34]399 N.E.2d at 837. *See also* Martinez v. State, 444 U.S. 277, 283-84 n.7 (1980). "We have never considered . . . whether a state *must* entertain a claim under § 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim." *Id.*

[35]398 N.E.2d 679 (Ind. Ct. App. 1979), *cert. denied*, 49 U.S.L.W. 3289 (U.S. 1980) [hereinafter referred to as *Thompson II*].

whether he must exhaust his state administrative remedies before an action could be brought. He pointed out that under federal law exhaustion of administrative remedies is not a condition precedent to the commencement of a § 1983 claim in the federal district court.

The court of appeals held that federal law concerning exhaustion of administrative remedies bound only the federal courts. Indiana state law requires exhaustion, and even a federal claim brought in an Indiana state court cannot proceed until the exhaustion requirement is met.[36]

3. Dismissal for Failure to Exhaust Administrative Remedies.— In this author's view, the court of appeals in *Thompson II* goes too far, and its disposition is open to serious question. The first opinion in that case, *Thompson v. Medical Licensing Board*[37] (*Thompson I*), affirmed the trial court's dismissal of the action.[38] The plaintiff had brought the action seeking declaratory and injunctive relief challenging the role of the Board itself and the manner in which it functions. The court in *Thompson I* did not discuss the available remedy under 42 U.S.C. § 1983.[39] *Thompson II* arose only because the plaintiff petitioned for a rehearing.[40]

The court in *Thompson II* concluded that the assertion of the federal statutory remedy must await the exhaustion of the state administrative remedy.[41] The court in *Thompson I*, however, had determined that there was *no remedy* in the trial court until the administrative remedy was first expended.[42]

The doctrine that an administrative remedy must be pursued and exhausted before bringing a court action is well established in Indiana.[43] A challenge to the agency's function or its Constitutional legitimacy, however, is quite distinguishable from a challenge to the correctness of the administrative determination. Exhaustion is obviously appropriate in the latter situation. Litigation might add

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[36]*Id.* at 680.

[37]389 N.E.2d 43 (Ind. Ct. App. 1979) [hereinafter referred to as *Thompson I*].

[38]*Id.* at 51.

[39]*See id.* at 46-51.

[40]398 N.E.2d at 679.

[41]*Id.* at 680.

[42]389 N.E.2d at 48.

[43]*See, e.g.*, State *ex rel.* Paynter v. Marion County Superior Court, 264 Ind. 345, 353, 344 N.E.2d 846, 851 (1976). *See also* Indiana Dep't of State Revenue v. Indiana Gamma Gamma of Alpha Tau Omega, Inc., 394 N.E.2d 187 (Ind. Ct. App. 1979) (Indiana courts lack jurisdiction to entertain an action for declaratory relief with respect to tax liability, when a statute prescribes pursuance of an administrative remedy to completion prior to suit). *But see* Schoffstall v. Failey, 389 N.E.2d 361 (Ind. Ct. App. 1979) (collateral attack on prior judgment alleging failure of the defendant to exhaust administrative remedy failed where the defendant had alleged and the court had found as a fact that the remedy had been exhausted).

years of delay to the process, and that precise reasoning was used to support exhaustion as a requirement in *Thompson I*.[44] Nevertheless, if a claim is made alleging violation of a civil right, such as Dr. Thompson's claim that the Board's function is itself unconstitutional, then a better disposition of the matter would have been for the trial court to retain jurisdiction but not exercise it until the administrative remedy was exhausted.[45]

The rationale which supports elimination of needless delay, though, should exempt the assertion of a Constitutional right from the exhaustion of remedies requirement. By not requiring exhaustion of the claim, needless years of litigation in the administrative agency might be avoided. If a claim is to be subjected to the exhaustion requirement, which was the holding in *Thompson II*, then the Indiana trial court should not hold the claim to be beyond the subject matter jurisdiction of the court. Rather, it is suggested, the Indiana trial court should be instructed to retain jurisdiction but to abstain from its exercise, unless sufficient facts are alleged to demonstrate that it should go forward with the suit immediately.

4. Standing in the Form of Determining Whether a Party Can Invoke the Court's Jurisdiction.—The decision in *Lutheran Hospital, Inc. v. Department of Public Welfare*,[46] continued the doctrine that standing requires a showing of injury or harm. Without that showing, a party cannot raise an issue or question which is said to flow from the conduct or act adverse to that party.[47] In this case, the

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[44]The court said:

> Allowing the Declaratory Judgment Act to be used as a vehicle to bypass the administrative process created by statute can seriously weaken the effectiveness of that process. Obviously years can be added to the administrative process before an administrative determination is made. Review of the process becomes piecemeal, an undesirable state of affairs resulting in unnecessary delay and duplication in a court system already burdened with demands exceeding its capacity to respond.

389 N.E.2d at 51. The question is, however, whether that kind of characterization is applicable at all to a constitutional claim which, if successful, will either reform the administrative process or bypass it completely.

[45]That assumes, of course, that the doctrine of exhaustion of administrative remedies is even applicable to civil rights or constitutional claims. *See id.* at 51-52 (Sullivan, J., concurring).

[46]397 N.E.2d 638 (Ind. Ct. App. 1979).

[47]The absence of standing will result in a complete denial of subject matter jurisdiction. *See* Aikens v. Alexander, 397 N.E.2d 319 (Ind. Ct. App. 1979). The court of appeals also interpreted IND. R. TR. P. 17(A)(1) in this context in *Aikens*. That rule requires, generally, that the real party in interest bring the action. Thus standing, if absent, will close the court entirely to a plaintiff's suit; and it will prevent, as in *Lutheran Hospital* a defendant from raising or litigating an issue.

An additional restriction is found in Volkswagenwerk, A.G. v. Watson, 390 N.E.2d 1082 (Ind. Ct. App. 1979). A declaratory judgment action was brought in an In-

hospital brought suit against the Allen County Department of Public Welfare for reimbursement for certain medical treatment which it had rendered to persons in that area. The hospital claimed that the Department had a statutory duty to transmit or provide those funds.[48] In view of the predominantly religious nature of the hospital, the Department attempted to raise certain constitutional questions, namely that the statute contravened the first amendment establishment clause of the United States Constitution, and article 1, section 6 of the Indiana Constitution.

The court of appeals noted that the Department had not alleged any injury and the record revealed none. The Department had no interest in the outcome of the litigation in that respect and therefore "lack[ed] the requisite standing to raise this constitutional argument."[49]

This aspect of standing must be distinguished from questions concerning the status of a plaintiff as an aggrieved party and whether that question affects the subject matter jurisdiction of a court. The distinction was made in *Wildwood Park Community Association v. Fort Wayne City Plan Commission*[50] in which the following language appears:

> The legal capacity of a party to prosecute its claim is a matter which affects the trial court's *jurisdiction over the particular case*—not its jurisdiction over the subject matter. . . . Unlike subject matter jurisdiction, which cannot be waived by a party and may be raised, *sua sponte*, by the court, jurisdiction over the particular case may be waived by the failure to make a specific and timely objection.[51]

Therefore, while a plaintiff must certainly allege status as an aggrieved party, failure of the defendant to challenge the allegation may constitute a waiver.

5. Standing in the Form of Authorization to Represent the

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diana state court, seeking a determination that Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966), was still sound Indiana law, despite the fact that *Evans* had been overruled by Huff v. White Motors Corp., 565 F.2d 104 (7th Cir. 1977). The Indiana Court of Appeals noted that a declaratory judgment would not terminate the litigation because the parties would still return to the federal court. The court stated: "The determinative factor is whether the declaratory action will result in a just and more expeditious and economical determination of the entire controversy." 390 N.E.2d at 1085. The court held declaratory relief to be inappropriate and affirmed the trial court's dismissal. *Id.* at 1086.

[48]*See* IND. CODE §§ 12-5-1-1 to -17 (1976).

[49]397 N.E.2d at 646.

[50]396 N.E.2d 678 (Ind. Ct. App. 1979).

[51]*Id.* at 681 (citations omitted).

State.—In *Banta v. Clark*,[52] the plaintiff brought suit for the refund of a tax payment. The defendant Department of Revenue hired outside counsel to represent it with the written permission of the Attorney General. The court of appeals held that under section 4-6-5-3,[53] the Attorney General had the exclusive right and power to represent the State of Indiana and its agencies and officers, and that those agencies and officers may not utilize outside counsel unless the Attorney General has consented in writing to that employment.[54] In view of the Department's compliance with the statutory requirements, the attorney's appearance was proper.

6. Jurisdiction to Discipline Attorneys.—In *McQueen v. State*,[55] the Indiana Supreme Court held that a superior court did not have the power to discipline an attorney by ordering that the attorney be suspended from the practice of law for a period of ninety days.[56] The court held that the authority to suspend attorneys from practice, once exercised in Indiana by circuit and superior courts, was completely abolished and that exclusive authority is found in the supreme court.[57] Additionally, the court held that suspension from practice was not one of the trial court's available punishments for contempt.[58] The court remanded the case with instructions to expunge from the trial court's records any order of suspension.[59]

7. Claims in General.—In *Thrasher v. Van Buren Township*,[60] the plaintiffs alleged that a township trustee failed to comply with a mandate to perform a statutory duty and asserted a claim for damages. The court of appeals recognized the damage claim for that failure, separate and distinct from the damages available in a mandate action.[61]

The damages claimed in this action arose following the mandate action and the contempt citation issued for the failure to follow the

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[52]398 N.E.2d 692 (Ind. Ct. App. 1979).

[53]IND. CODE § 4-6-5-3 (1976).

[54]398 N.E.2d at 693.

[55]396 N.E.2d 903 (Ind. 1979).

[56]*Id.* at 906.

[57]*Id.* at 905.

[58]*Id.* at 906. *See* IND. CODE § 34-4-7-6 (1976).

[59]396 N.E.2d at 906.

[60]394 N.E.2d 215 (Ind. Ct. App. 1979).

[61]*Id.* at 222. *See* IND. CODE § 34-1-58-4 (1976) which provides:

> Said action for mandate shall stand for issue and trial, and issues of law and fact may be joined, and amendments, continuances and appeals granted therein, as in other civil actions; and in rendering final judgments in said actions, if the finding and judgments be for the plaintiff, the court shall grant and adjudge to the plaintiff such relief, and such only, as he may be entitled to under the law and facts in such action, together with damages as in actions for false returns, and costs shall be awarded as the court may direct.

mandate. Because these damages were not litigated between the parties in the mandate proceeding, the action could not be dismissed under Trial Rule 12(B)(8).[62]

The recognition of a claim was denied, however, in *Winchell v. Aetna Life & Casualty Insurance Co.*[63] where the plaintiff alleged that she had a fiduciary relationship with the defendant insurance company because she was insured under a policy. She attempted to extend that alleged relationship to a lawsuit which the plaintiff had brought against another defendant who happened to be insured by the same insurance company. She asserted that Aetna's failure to settle the second suit breached the alleged fiduciary relationship.

The court of appeals held that no such fiduciary relationship, if existent, could possibly extend to the plaintiff's unrelated lawsuit. The court of appeals affirmed[64] the trial court's dismissal under Trial Rule 12(B)(6).[65]

a. Second suit to enforce judgment.—The decision in *Ice v. State*[66] arose in a civil contempt suit filed to enforce an injunction which the Board of Dental Examiners had obtained in an earlier action proscribing the defendant's unauthorized practice of dentistry. The court of appeals held that the action would lie and that the injunction was enforceable in that manner.[67] The decision in *Martin v. Indianapolis Morris Plan Corp.*[68] upheld a second suit in which the creditor filed a complaint seeking recovery of a sum due on an unpaid judgment.[69]

Those two actions alone show that this writer's earlier comments concerning Trial Rule 69(E)[70] are of doubtful validity, and that

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[62]IND. R. TR. P. 12(B)(8) allows a dismissal when the same action is "pending in another state court of this state." The trial court reasoned that the same action was pending in another state court; the court of appeals held that the second action was not identical to the pending action. 394 N.E.2d at 220.

[63]394 N.E.2d 1114 (Ind. Ct. App. 1979).

[64]*Id.* at 1118.

[65]IND. R. TR. P. 12(B)(6) allows dismissal for "[f]ailure to state a claim upon which relief can be granted . . . ."

[66]397 N.E.2d 1041 (Ind. Ct. App. 1979).

[67]*Id.* at 1043.

[68]400 N.E.2d 1173 (Ind. Ct. App. 1980).

[69]*Id.* at 1176.

[70]This writer had speculated:

> Rule 69(E) is couched in permissive terms. Argument therefore may be made that proceedings supplemental to execution by a separate action is still possible as it was before the Rule. However, the term "may" in this rule could very well be read as "shall" in terms of where the remedy is initiated. As an ancillary remedy to the judgment, much inconvenience ordinarily will be avoided by allowing proceedings supplemental to continue in the original case. If an independent proceeding is allowed, and if change of venue in such cases is permitted, no real over-all advantage will be gained by allowing the

the rule was not intended to and did not foreclose a second action to enforce a judgment.

b. Notice of claim under the Indiana Tort Claims Act.—In *Lawrence County Commissioners v. Chorely*,[71] the court held that the notice provisions of the Tort Claims Act,[72] are applicable to a claim in a small claims court or proceeding, and that consistent with *Delaware County v. Powell*,[73] substantial compliance with the notice requirements was sufficient.[74] The *Powell* case is a leading decision on notice to a municipality or a county under the Act. In *Chorely*, as in *Powell*, the defendant had actual knowledge of the accident, agreed to pay the damages, investigated the claim, accepted estimates and told the plaintiff to bring suit, and the plaintiff did commence the action. The court held those facts to constitute more than sufficient actual notice, and therefore Chorely had substantially complied with the notification requirements under the Tort Claims Act.[75]

c. Interest on judgments against a governmental entity.—Section 34-4-16.5-17[76] of the Indiana Code was amended by House Enrolled Act Number 1473[77] to clarify the provisions with respect to in-

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independent action in the county of the judgment debtor's residence as it must be under the proceedings supplemental statutes. See Burns §§ 2-4401, 2-4402.

4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 475 (1971).

[71]398 N.E.2d 694 (Ind. Ct. App. 1979).

[72]IND. CODE §§ 34-4-16.5-6, -7 (1976).

[73]393 N.E.2d 190 (Ind. 1979).

[74]398 N.E.2d at 698.

[75]*Id.*

[76]IND. CODE § 34-4-16.5-17 (Supp. 1980).

[77]Act of March 3, 1980, Pub. L. No. 198, 1980 Ind. Acts 1630 provides:

SECTION 1. IC 34-4-16.5-17 is amended to read as follows: Sec. 17. A claim or suit settled by, or a judgment rendered against, a governmental entity shall be paid by it not later than one hundred eighty (180) days after *the date of* settlement or judgment, unless there is an appeal, in which case not later than one hundred eighty (180) days after a final decision is rendered. If payment is not made within one hundred eighty (180) days *after the date of settlement or judgment*, the governmental entity is liable for interest from the date of settlement or judgment at an annual rate of eight percent (8%). *The governmental entity is liable for interest at that rate and from that date even if the case is appealed, provided the original judgment is upheld.*

SECTION 2. (a) Notwithstanding the conflicting provisions of IC 34-4-16.5-17, for any case on appeal on the effective date of this act upon which a final decision has not been rendered or a final settlement has not been reached, any interest required to be paid by IC 34-4-16.5-17 accrues and accumulates only from the effective date of this act.

(b) Because an emergency exists, this act takes effect upon passage.

The italicized portions show additions to the text of the previously existing section.

In a somewhat related matter concerning attorneys fees, the supreme court has

terest on a settlement with, or judgment against, a governmental entity. The statute requires that the amount be paid not later than 180 days after the date of the settlement or the judgment. If a judgment is appealed, the amount must be paid within 180 days after the final decision is rendered. The new provision clarifies that the liability for interest arises if a settlement or judgment is not paid within 180 days from the date of the settlement or original judgment regardless of whether a judgment is appealed.

The calculation period for the interest runs from the date of the settlement or the judgment to the date of payment. Although the government may delay payment until 180 days after the final appellate decision is rendered, the interest liability is still calculated from the date of the original adverse judgment if that judgment is upheld on appeal.

d. Suits under Trial Rule 60 and the 1980 amendment to Trial Rule 60.—The opinion in *Anderson v. Anderson*[78] contains an excellent discussion of Trial Rule 60[79] from the perspective that a motion or complaint made under that rule is in fact a separate claim. The motion or complaint is usually made to set aside another judgment or final order of some kind, or to correct a mistake in a judgment or order.

In *Anderson*, an action was brought by Mrs. Anderson against her former husband, an attorney, alleging generally that her former husband had failed to give adequate advice to her when their marriage was dissolved.

The court of appeals held that this action was premature because the dissolution of marriage action contemplates two distinct rulings by the trial court; the first ruling decrees that the marriage is dissolved, and the second ruling accomplishes a division of property.[80] The latter had not occurred when this complaint was filed.

However that may be, the court held that the complaint by the wife pursuant to Trial Rule 60(B) did constitute a direct attack upon the dissolution decree, and that rules concerning former adjudication or res judicata were inapplicable.[81] The court said that an "independent action to avoid a judgment because of fraud in the procurement is an equitable proceeding and, as such, it is subject to the

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held that under IND. R. TR. P. 60.5, where the judge institutes the action in his official capacity, not for his personal reward but for the purpose of meeting the operational needs of the court, a reasonable attorney fee must be paid by the county. Levco v. Auditor of State, 393 N.E.2d 749 (Ind. 1979); Hale v. Smith, 390 N.E.2d 645 (Ind. 1979).

[78]399 N.E.2d 391 (Ind. Ct. App. 1979).

[79]IND. R. TR. P. 60(B). For a discussion of the rule and the 1980 amendment, see the text accompanying notes 88-90 *infra*.

[80]399 N.E.2d at 401.

[81]*Id.* at 400.

rules of equitable discretion."[82] One of those rules denies equitable relief when a legal remedy is available, and in *Anderson*, the wife had not yet obtained a decree on the division of the marital property. The court noted that when that issue is litigated, the wife could raise the question of the husband's alleged concealment or misrepresentation concerning the marital property. Hence, this action under Trial Rule 60(B), an independent action to set aside a judgment procured by fraud, was premature.[83]

The court came to the same conclusion concerning the allegation of legal malpractice, and observed that "[t]he law is well settled in Indiana that an attorney may be held liable to his client for damages resulting from his failure to exercise ordinary care, skill, and diligence."[84] In this instance, however, the claim for legal malpractice had likewise not yet ripened because there had been no division of property. Accordingly this claim also was premature.[85]

In *James v. Board of Commissioners*,[86] the appellate court held that Trial Rule 60(B) was not available to attempt to perfect a review of a nonappealable interlocutory order.[87] The holding in *James* was called into question by the 1980 amendment to Trial Rule 60(B),[88] because of the language found in that amendment, and the very expansive interpretation which it might be given.

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[82]*Id. In re* Marriage of Jones, 389 N.E.2d 338 (Ind. Ct. App. 1979), contains an extensive discussion of the interrelationship of the various criteria found in Trial Rule 60(B) and the equitable discretion which the trial court holds, provided of course that the complaint is timely made under the rule and the evidentiary burden which the plaintiff carries is met. "TR. 60(B) is directed to relief on equitable as opposed to legal grounds, except insofar as permitted under TR. 60(B)(2)." *Id.* at 340. *See also* Pacurar v. Hernly, 611 F.2d 179 (7th Cir. 1979) (successful attack on a void judgment under the federal counterpart of the Indiana rule).

[83]399 N.E.2d at 401.

[84]*Id.*

[85]*Id.* at 402.

[86]396 N.E.2d 429 (Ind. Ct. App. 1979).

[87]*Id.* at 433.

[88]The full text of the 1980 amendments to Trial Rule 60, is as follows:

Typing Code

The words in *this style type* are additions to the rule. The words in ~~this style type~~ are deletions from the rule. Sections or subsections of the rule that have been repositioned are stylized according to this typing code.

Trial Rule 60

RELIEF FROM JUDGMENT OR ORDER

(A) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the *trial* court at any time *before the record is filed on appeal* of its own initiative or on the motion of any party and after such

One purpose of the 1980 amendment was to extend Trial Rule 60(B) relief to the entry of a default judgment in addition to a judg-

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notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the court on appeal, and thereafter while the appeal is pending may be so corrected with leave of the court on appeal.

(B) Mistake—Excusable neglect—Newly discovered evidence—Fraud, etc. On motion and upon such terms as are just the court may relieve a party or his legal representative from ~~a final judgment, order, default or proceeding~~ *an order, entry of default, proceeding, or final judgment, including a judgment by default,* for the following reasons:

(1) mistake, surprise, or excusable neglect;

(2) any ground for a motion to correct error, including without limitation newly discovered evidence, which by due dilgence [*sic*] could not have been discovered in time to move for a motion to correct errors under Rule 59;

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) *entry of default or* judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the action and judgment, order or proceedings;

(5) except in the case of a divorce decree, the record fails to show that such party was represented by a guardian or other representative, and if the motion asserts and such party proves that

(a) at the time of the action he was an infant or incompetent person, and

(b) he was not in fact represented by a guardian or other representative, and

(c) the person against whom the judgment order or proceeding is being avoided procured the judgment with notice of such infancy or incompetency, and, as against a successor of such person, that such successor acquired his rights therein with notice that the judgment was procured against an infant or incompetent, and

(d) no appeal or other remedies allowed under this subdivision have been taken or made by or on behalf of the infant or incompetent person, and

(e) the motion was made within ninety [90] days after the disability was removed or a guardian was appointed over his estate, and

(f) the motion alleges a valid defense or claim;

(6) the judgment is void;

(7) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(8) any ~~other~~ reason justifying relief from the operation of the judgment, *other than those reasons set forth in subparagraphs (1), (2), (3), and (4).*

The motion shall be ~~made~~ *filed* within a reasonable time, ~~and~~ for reasons ~~(1), (2), (3), and (4)~~ *(5), (6), (7), and (8), and* not more than one ~~[1]~~ year after the judgment, order or proceeding was entered or taken *for reasons (1), (2), (3), and (4).* A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judg-

ment upon default, as shown by the Rules Committee comment.[89] However that may be, the court of appeals pointed out in *Pathman*

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ment, order or proceeding or for fraud upon the court. Writs of coram nobis, coram vobist, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(C) Appeal—Change of venue. A ruling or order of the court denying or granting relief, in whole or in part, by motion under subdivision (B) of this rule shall be deemed a final judgment, and an appeal may be taken therefrom as in the case of a judgment. No change of venue in such cases shall be taken from the judge or county except for cause shown by affidavit.

(D) Hearing and relief granted. In passing upon a motion allowed by subdivision (B) of this rule the court shall hear any pertinent evidence, allow new parties to be served with summons, allow discovery, grant relief as provided under Rule 59 or otherwise as permitted by subdivision (B) of this rule.

(E) Infants, incompetents, and governmental organizations. Except as otherwise provided herein, this rule shall apply to infants, incompetents, and governmental organizations. The time for seeking relief against a judgment, order or proceeding allowed or recognized under subdivision (B) of this rule or any other statute shall not be tolled or extended as to such persons.

SUPREME COURT ADVISORY COMMITTEE ON REVISION OF RULES OF PROCEDURE AND PRACTICE, RECOMMENDATIONS FOR RULE CHANGES (Proposed Final Draft 1979) [hereinafter cited as COMMITTEE NOTE] (available from: Rules Committee Secretary, 323 State House, Indianapolis, Indiana 46204).

[89]The full text of the Committee's comment on Trial Rule 60 follows:

The Rule in its revised form accomplishes a dual purpose:

(1) The first change is intended to dispel any suggestion in the present Rule, Trial Rule 60(A), that a trial court might effect correction of a clerical error after filing of the record in the appellate tribunal, without leave of the appellate court.

(2) The second change is intended to comply with a direct request from the Supreme Court to bring Trial Rule 60(B) in conformance with the decision of the First District Court of Appeals in Pounds v. Pharr, (1st Dist. 1978) Ind.App., 376 N.E.2d 1193. The latter case held; citing Henline Inc. v. Martin, (2nd Dist. 1976) Ind.App., 348 N.E.2d 416, that entry of default (as distinguished from the judgment upon default) was subject to a Motion made pursuant to Trial Rule 60(B) and that accordingly, denial of such a Trial Rule 60 Motion was directly appealable.

It may be noted that in this regard the effect of the Rule change is to nullify the contrary holding of Green v. Karol, (3rd Dist. 1976) Ind.App., 344 N.E.2d 106.

Pounds v. Pharr, *supra*, [held] that a Trial Rule 60(B) motion for relief from an entry of default which, although specifically alleging cause for relief pursuant to Trial Rule 60(B)(8), is based upon facts which may arguably constitute "excusable neglect" must be considered a Motion pursuant to Trial Rule 60(B)(1) rather than pursuant to Trial Rule 60(B)(8) and thus must be filed within the one-year time limitation applicable to Trial Rule 60(B)(1), (2), (3) and (4). To the same effect is H & A, Inc. v. Gilmore, (3rd Dist. 1977) Ind.App., 359 N.E.2d 259 (reversing Trial Rule 60(B)(8) relief from a judgment entered on default).

The Rule change implements the thrust of Pounds v. Pharr, *supra*, and

Construction Co. v. Drum-Co Engineering Corp.,[90] that the 1980 amendment would allow an interpretation which would extend complaints or motions under Trial Rule 60 to any order, whether final or not.[91] The court correctly concluded that such an expansive interpretation was not the intention of the 1980 amendment, and that a Trial Rule 60(B) request for relief must still be directed to final judgments or orders[92] or the entry of a default order and a judgment upon default.[93]

8. Service of Process.—In *Gemmer v. Anthony Wayne Bank*,[94] the appellant had moved to quash two "alias" summons which were procured by the plaintiff's attorney after it became apparent that the post office had lost the initial summons issued by the clerk at the filing of the complaint. The appellant alleged that the two summons had been obtained by plaintiff's attorney approximately two to three months after the first summons, and that the delay was unreasonable. The trial court had denied the motion.[95]

The appellate court affirmed the denial, holding that there was nothing in the last sentence of Trial Rule 4(B)[96] which imposed a time limit for the issuance of an alias or additional summons, and that there was no unreasonable delay in procuring the issuance of the two summons.[97]

In *Munden v. Munden*,[98] a dissolution of marriage by default was obtained by the appellee, whose wife was a voluntary commitment patient at a mental health center. The record did not show that ser-

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H & A, Inc. v. Gilmore, *supra*, with respect to the one-year time limitation. It therefore, casts doubt upon the continued validity of the holding in Fitzgerald v. Brown, (1st Dist. 1976) Ind.App., 344 N.E.2d 309 and upon dictum in Sheraton Corp. of America v. Korte Paper Co., (3rd Dist. 1977) Ind.App., 363 N.E.2d 1263.

COMMITTEE NOTE, *supra* note 88, *reprinted in* 1 1980 Ann. Ind. Code Serv. 369-70 (West).

[90]402 N.E.2d 1 (Ind. Ct. App. 1980).

[91]*Id.* at 6 n.4.

[92]The court in *In re* Estate of Garwood, 400 N.E.2d 758 (Ind. 1980), restated the traditional proposition that a trial court's order is final and appealable when it determines all of the merits of the entire case among the parties, even if there are incidental acts or ministerial forms of relief remaining which do not affect the finality of the trial court's determination.

[93]402 N.E.2d at 6-7 n.4.

[94]391 N.E.2d 1185 (Ind. Ct. App. 1979).

[95]*Id.* at 1190.

[96]The last sentence of IND. R. TR. P. 4(B) states: "Separate or additional summons shall as provided by these rules be issued by the clerk at any time upon proper request of the person seeking service or his attorney."

[97]391 N.E.2d at 1191. The use of "alias" summonses was not impermissible either. *Id.* (citing IND. R. TR. P. 4.15(F)).

[98]398 N.E.2d 680 (Ind. Ct. App. 1979).

vice was made upon the wife pursuant to Trial Rule 4.2(B)[99] or Trial Rule 4.3.[100] Furthermore, the record failed to show whether the wife was represented by a guardian ad litem, pursuant to Trial Rule 17(C).[101] Finally, the plaintiff had made no disclosure about the wife's mental infirmities as required by Trial Rule 4.2(C).[102] The court of appeals set aside the default judgment because of the husband's conspicuous failure to comply with the service of process requirements.[103]

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[99]IND. R. TR. P. 4.2(B) states in part:

Service upon an individual who has been adjudged to be of unsound mind, otherwise incompetent or who is believed to be such shall be made upon his next friend or guardian ad litem, if service is with respect to the same action in which the incompetent is so represented. If there is no next friend or, guardian ad litem, service shall be made upon his court-appointed representative if one is known and can be served within this state. If there is no court-appointed representative, then upon the named party and also upon a person known to be standing in the position of custodian of his person.

[100]IND. R. TR. P. 4.3 states in part:

Service of summons upon a person who is a imprisoned or restrained in an institution shall be made by delivering or mailing a copy of the summons and complaint to the official in charge of the institution. It shall be the duty of said official to immediately deliever the summons and complaint to the person being served and allow him to make provisions for adequate representation by counsel. The official shall indicate upon the return whether the person has received the summons and been allowed an opportunity to retain counsel.

[101]IND. R. TR. P. 17(C) states in part:

An infant or incompetent person may sue or be sued in any action

(1) in his own name,

(2) in his own name by a guardian ad litem or a next friend,

(3) in the name of his representative, if the representative is a court-appointed general guardian, committee, conservator, guardian of the estate or other like fiduciary.

The court, upon its own motion or upon the motion of any party, must notify and allow the representative named in subsection (3) of this subdivision, if he is known, to represent an infant or incompetent person, and be joined as an additional party in his representative capacity. *If an infant or incompetent person is not represented, or is not adequately represented, the court shall appoint a guardian ad litem for him.*

(Emphasis added).

[102]IND. R. TR. P. 4.2(C) states in part:

Nothing herein is intended to affect the duty of a party to inform the court that a person is an infant or incompetent. An appearance by a court-appointed guardian, next friend or guardian ad litem or his attorney shall correct any defect in service under this section unless such defect be challenged.

[103]398 N.E.2d at 682. *See also* Porter v. Harrison Township Volunteer Fire Dep't, 399 N.E.2d 445 (Ind. Ct. App. 1980) (reversal of summary judgment in which the court of appeals commented that "the trial court would have been correct in [dismissing those third-party defendants pursuant to] Trial Rule 12(B)(4)" because the defendant had failed to serve the third-party defendants with a summons or complaint).

The court of appeals, in *Buck v. P.J.T.*,[104] reiterated the standard used to determine the constitutional adequacy of notice. The trial court had denied appellant's motion to set aside a default judgment entered three years before in which appellant was held to be the father of the appellee. Appellant had been served in Illinois in that action but did not enter an appearance. The court of appeals sustained the service of process in Illinois, observing that there was no dispute as to sufficient contacts with Indiana to sustain the exercise of jurisdiction.[105] The dispute challenged the adequacy of the notice, and the court used the following language:

> There is a difference between a form of service that is not reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to be heard and a form that, while reasonably calculated to give actual notice, fails to do so in a specific case. In the former, personal jurisdiction is not acquired because the proceeding fails to accord due process. In the latter, personal jurisdiction is present. However, the result of its exercise may be set aside as a matter of fairness and good conscience. *See, e.g.*, Indiana Rules of Procedure, Trial Rule 60(B).
>
> The form of service on non-residents here employed under TR 4.4(B) is precisely the same as that for service upon residents. TR 4.1(A)(1). Service delivered by United States mail, postage prepaid, as certified mail with a return receipt satisfies the method requirement of due process. No contention is made that the information contained was inadequate or that inadequate time to respond was provided. Since actual delivery to the party is not jurisdictionally necessary, Buck's argument that the court failed to acquire personal jurisdiction fails.
>
> Moreover, it does not appear the court erred in refusing to grant relief under TR 60(B). At no point does Buck assert that he did not receive timely actual notice. Nor, for that matter, does he assert any reasons explaining the long delay in filing his TR 60 motion. No abuse of discretion appears.[106]

9. Venue and Change of Venue.—In *State ex rel. Indiana Life & Health Insurance Guaranty Association v. Superior Court*,[107] the

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[104]394 N.E.2d 935 (Ind. Ct. App. 1979).
[105]*Id.* at 936.
[106]*Id.* at 936-37.
[107]399 N.E.2d 356 (Ind. 1980).

supreme court construed Trial Rule 75(E)[108] which provides, generally, that a trial court, in ruling upon a transfer request under Rule 75, does not issue a final or appealable order or judgment at that time. Furthermore, an error by the court shall be grounds for a new trial only if it is shown that the party asserting the error was prejudiced or injured in the refusal to transfer. The supreme court pointed out that Trial Rule 75[109] requires that an objection be presented to the trial court in a pleading or a Trial Rule 12(B)(3)[110] motion within the time limitations which are found in Trial Rules 6[111] and 12.[112] Under those two rules, a responsive pleading or a 12(B) motion must be filed within twenty days of the complaint.[113] In this particular case the request for transfer was not filed within that time period, and the court held that the venue objection was waived.[114]

This interpretation of the rule was reinforced in *Martin v. Indianapolis Morris Plan Corp.*,[115] in which the court of appeals held that a party claiming error under Trial Rule 75(E) must show and document present actual injury in order to bring himself under that rule.[116] In *Martin*, the moving party filed a motion for preferred venue which set out that the residence of the defendant was over a hundred miles from the city of Indianapolis and that traveling to Indianapolis for the litigation would work undue hardship upon him and his attorney. The court of appeals held that allegation to be insufficient.[117] It was not a showing of present harm or injury, but was

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[108]IND. R. TR. P. 75(E) states:

> The ruling of a court granting or refusing to order a case transferred under this rule is not a final or appealable order or judgment, and error of the court therein is grounds for a new trial or reversible error only when evidence in the record shows that the party asserting error was prejudiced or injured thereby.

[109]IND. R. TR. P. 75(A) provides for a change of venue if the trial court determines that the county or court where the action was filed does not meet the preferred venue requirements of the rule. That disposition would come, under the language of the rule, after the filing of "a pleading or a motion to dismiss allowed by Rule 12(B)(3) . . . ." IND. R. TR. P. 75(A). The rule further states that "[t]he pleading or motion permitted by this rule must be filed within the time prescribed for the party making it by Rules 6 and 12 and any other applicable provision of these rules." IND. R. TR. P. 75(A)(10).

[110]IND. R. TR. P. 12(B)(3).

[111]*See* IND. R. TR. P. 6(C).

[112]*See* IND. R. TR. P. 12(A), (B).

[113]IND. R. TR. P. 12(B)(8) is more specific and does not refer to the word "complaint" as such. It states in part: "A motion making any of these defenses shall be made before pleading if a further pleading is permitted or within twenty [20] days after service of the prior pleading if none is required." *Id.*

[114]399 N.E.2d at 359.

[115]400 N.E.2d 1173 (Ind. Ct. App. 1980).

[116]*Id.* at 1176.

[117]*Id.*

simply a speculative allegation of a possible injury in futuro. Hence, there must be an evidentiary showing of actual harm or prejudice to support a motion for transfer under Trial Rule 75, and from this it follows that the trial court must provide the moving party an opportunity to make that evidentiary showing. In view of these two decisions, this writer suggests that the failure to present a moving party with that opportunity would be prejudicial error which should be remedied by a motion for mandate or prohibition.

In *McLaughlin v. American Oil Co.*,[118] a medical malpractice action was filed against the defendant and its company physician. In the Lake Superior Court, a motion by the defendants for summary judgment was denied. However, the case was venued to the LaPorte Circuit Court, where the defendants again pursued the motion which the court granted upon reconsideration of an initial denial.

The plaintiff argued on appeal that the first ruling was binding on the LaPorte Circuit Court, but the court of appeals stated "that the ruling of the first judge who exercises jurisdiction does not become the law of the case. . . . [T]he judge who later has jurisdiction is duty-bound to exercise his judicial discretion 'as though the matter were presented for the first time.'"[119] The court also stated that "a trial court has inherent power to reconsider, vacate or modify any previous order, so long as the case has not proceeded to judgment. . . ."[120]

C. Pleadings and Pre-Trial Motions

1. Amendment to Trial Rule 5(B)(1).[121]—This rule was amended to broaden the definition of "delivery" with respect to service upon

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[118]391 N.E.2d 864 (Ind. Ct. App. 1979).

[119]*Id.* at 865 (citing State *ex rel.* Williams Coal Co. v. Duncan, 211 Ind. 203, 6 N.E.2d 342 (1937)).

[120]391 N.E.2d at 865.

[121]IND. R. TR. P. 5(B)(1) was amended as follows:

> The words in *this style type* are additions to the rule. . . .
>
> (B) Service: How made. Whenever a party is represented by an attorney of record, service shall be made upon such attorney unless service upon the party himself is ordered by the court. Service upon the attorney or party shall be made by delivering or mailing a copy of the papers to him at his last known address.
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> (1) Delivery. Delivery of a copy within this rule means
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> (a) handling it to the attorney or party;
>
> (b) leaving it at his office with a clerk or other person in charge thereof, or if there is no one in charge, leaving it in a conspicuous place therein; or
>
> (c) if the office is closed, by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; *or*,

a party's attorney. The rule now permits delivery to be made at a place designated by the attorney for receiving delivery such as at a box in a court house. If that form of delivery is to be used, it must first be approved by an order or rule promulgated from a local court. However, the rule plainly means that even if a local rule of court permits this kind of delivery, an attorney may choose not to use it. If that is the attorney's choice, then this form of delivery to him or her is not available.

2. Filing a Complaint by Mail.—In an interpretation of Trial Rule 5(E)(2),[122] the court of appeals has determined that a *complaint* which was filed by registered or certified mail is deemed filed when mailed, and not when received or file marked or stamped. The court reasoned, in *Chalmers v. Estate of Market*,[123] that a complaint was a pleading under Trial Rule 7(A),[124] and further that under prior case law the word "papers" encompassed pleadings. A complaint is thus subject to Trial Rule 5(E)(2)'s filing provisions.

3. Pleadings and Motions.—In *Smith v. City of South Bend*,[125] the court of appeals held, in an interpretation of Trial Rule 7(A),[126] that a response to a motion to produce which was made under Trial

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(d) leaving it at some other suitable place, selected by the attorney upon whom service is being made, pursuant to duly promulgated local rule.

COMMITTEE NOTE *supra* note 88.

[122]IND. R. TR. P. 5(E) states in part:

The filing of pleadings and papers with the court as required by these rules shall be made by one of the following methods:

(1) Delivering the pleadings or papers to the clerk of the court;

(2) Mailing the papers to the clerk by registered or certified mail return receipt requested; or

(3) If the court so permits, filing the papers with the judge, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Filing by registered or certified mail shall be complete upon mailing.

[123]397 N.E.2d 636 (Ind. Ct. App. 1979).

[124]IND. R. TR. P. 7(A) states in part:

The pleadings shall consist of

(1) a complaint and an answer;

(2) a reply to a denominated counterclaim;

(3) an answer to a cross-claim;

(4) a third party complaint, if a person not an original party is summoned under the provisions of Rule 14; and

(5) a third-party answer.

No other pleadings shall be allowed; but the court may, in its discretion, order a reply to an answer or third-party answer. Matters formerly required to be pleaded by a reply or other subsequent pleading may be proved even though they are not pleaded.

[125]399 N.E.2d 846 (Ind. Ct. App. 1980).

[126]IND. R. TR. P. 7(A). *See* note 124 *supra*.

Rule 34[127] was not a pleading,[128] and that statements made within such written response cannot be considered as admissions as would those in a pleading. The plaintiff had argued that the responses to the discovery demand should be regarded as an admission, but the court said that the reply to the discovery demand was not intended to produce evidence but to deny the existence of the materials sought by the plaintiffs.

The remedy of quo warranto was discussed in *Hovanec v. Diaz*,[129] where the action was brought to declare a judicial office vacant because of a change in township residence by the judge. The supreme court noted that "[h]istorically, quo warranto is the proper remedy to determine the right to an office,"[130] and held that "[a]lthough a private person may pursue a quo warranto action, he must demonstrate a personal interest distinct from that of the general public . . . . [T]hat interest must be in the right or title to the office."[131] The plaintiff's interest[132] fell short of those requirements.

4. Affirmative Defenses.—In *Thrasher v. Van Buren Township*,[133] the court of appeals stated that "[r]es judicata is an affirmative defense which must be asserted in a responsive pleading [under T.R. 8(C)[134] and that it] may be raised in a T.R. 12(B)(6) motion

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[127]IND. R. TR. P. 34.

[128]399 N.E.2d at 850. *See also* Pomerenke v. National Life & Accident Ins. Co., 143 Ind. App. 472, 241 N.E.2d 390 (1968) (a motion for a summary judgment is not a pleading).

[129]397 N.E.2d 1249 (Ind. 1979).

[130]*Id.* at 1250. In Madden v. Houck, 403 N.E.2d 1133 (Ind. Ct. App. 1980), the court of appeals held that quo warranto was the proper remedy to determine a right to an office, and that a declaratory judgment action would not lie for that purpose.

[131]397 N.E.2d at 1250.

[132]The plaintiff claimed status as a taxpayer and as a criminal defendant in the court in question.

[133]394 N.E.2d 215 (Ind. Ct. App. 1979).

[134]IND. R. TR. P. 8(C) provides in part:

> A responsive pleading shall set forth affirmatively and carry the burden of proving: Accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statue of frauds, statute of limitations, waiver, lack of jurisdiction over the subject-matter, lack of jurisdiction over the person, improper venue, insufficiency of process or service of process, the same action pending in another state court of this state, and any other matter constituting an avoidance, matter of abatement, or affirmative defense. A party required to affirmatively plead any matters, including matters formerly required to be pleaded affirmatively by reply, shall have the burden of proving such matters. The burden of proof imposed by this or any other provision of these rules is subject to the rules of evidence or any statute fixing a different rule. If the pleading mistakenly

if the defense appears on the face of the complaint."[135]

The elements of *res judicata* were discussed in several Indiana decisions, and the principal doctrine was again identified by the court in *Union Insurance Co. v. State ex rel. Indiana Department of Insurance*,[136] where the court stated:

> The doctrine has four essential elements:
>
> (1) the former judgment must have been rendered by a court of competent jurisdiction;
>
> (2) the matter now in issue was,[137] or might have been, determined in the former suit;[138]
>
> (3) the particular controversy adjudicated[139] in the former action must have been between the parties to the present suit;
>
> (4) the judgment in the former suit must have been rendered on the merits.[140]

In *Ross v. Ross*,[141] a wife petitioned the court to cite her husband for contempt for failure to pay a child support judgment. The husband alleged that the children were emancipated. The appellate court held that under Trial Rule 8(C), *emancipation* was an affirmative defense, which the husband failed to establish to the satisfaction of the trial court.[142] Therefore, the pleading and proof requirements of Trial Rule 8(C) now apply to this defense.

In *American Underwriters, Inc. v. Curtis*,[143] an action in a proceeding supplemental against the insurance company, the court held that a "no action clause" in an insurance contract[144] constituted an

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designates a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation.

[135]394 N.E.2d at 221. IND. R. TR. P. 12(B)(6) provides for a motion to dismiss when there is a "[f]ailure to state a claim upon which relief can be granted, which shall include the failure to name the real party in interest under [Trial] Rule 17."

[136]401 N.E.2d 1372 (Ind. Ct. App. 1980).

[137]The question of an Oklahoma court's jurisdiction could not be relitigated in Indiana by the same parties. Pringle v. Standard Life & Accident Ins. Co., 391 N.E.2d 677 (Ind. Ct. App. 1979). The issue had been litigated in Oklahoma in the court from which the judgment had come.

[138]The probate court's decision on a disputed question was binding on the superior court. Blake v. Blake, 391 N.E.2d 848 (Ind. Ct. App. 1979).

[139]"Issue preclusion" and "claim preclusion" were discussed in State v. Speidel, 392 N.E.2d 1172 (Ind. Ct. App. 1979). The court pointed out that "claim preclusion" does not bar a second action which comes from the same tortious act when two or more separate actions may arise from that act. *Id.* at 1175. *See also* Whipple v. Dickey, 401 N.E.2d 787 (Ind. Ct. App. 1980).

[140]401 N.E.2d at 1378.

[141]397 N.E.2d 1066 (Ind. Ct. App. 1979).

[142]*Id.* at 1068.

[143]392 N.E.2d 516 (Ind. Ct. App. 1979).

[144]*See generally* IND. CODE § 9-2-1-5(c) (Supp. 1980).

affirmative defense which must be specifically pleaded in an answer to the claimant's garnishment action.[145] The insurance company did not specifically plead the defense, and the court held that to be fatal.[146] As a result the court did not meet the question whether an actual trial was necessary in order to proceed against the insurance company after the insured had defaulted in an earlier proceeding brought against him.

Another affirmative defense arose in *Construction Associates v. Peru Community School Building Corp.*,[147] in which the defendant had pleaded *failure of consideration*. Though it was properly raised, there was no factual finding by the trial court concerning the defense. The court of appeals noted that no negative implication could arise or be made against the defendant under Trial Rule 52(D),[148] and remanded to the trial court for, *inter alia*, a finding on the facts related to the affirmative defense of failure of consideration.[149]

A very important decision concerning the affirmative defense of the *statute of limitations* developed in *Ferdinand Furniture Co. v. Anderson.*[150] The plaintiff's evidence disclosed that the statute had run. The defendant claimed that it was not necessary for him to present essentially the same evidence during his "side" of the case, even though he had the burden of producing evidence to support the affirmative defense. The court of appeals agreed and held that it was not necessary for a defendant to prove a defense when it was proven by the plaintiff's evidence.[151] The defendant had still carried his evidentiary burden.

5. Amendment to Pleadings.—In Health & Hospital Corp. v. Gaither,[152] the supreme court held that when a defendant *amended* its answer after the plaintiff was given leave to amend the complaint under Trial Rule 15(A),[153] and the amended answer did not

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[145]392 N.E.2d at 518.

[146]*Id.*

[147]393 N.E.2d 792 (Ind. Ct. App. 1979).

[148]IND. R. TR. P. 52(D).

[149]393 N.E.2d at 797.

[150]399 N.E.2d 799 (Ind. Ct. App. 1980).

[151]*Id.* at 802.

[152]397 N.E.2d 589 (Ind. 1979).

[153]IND. R. TR. P. 15(A) states in part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial calendar, he may so amend it at any time within thirty [30] days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires. A party shall plead in response to an amended

raise the affirmative defense of untimely notice to the municipal defendant, then that issue, which was raised in the first answer, was no longer before the trial court.[154]

Trial Rule 15(B)[155] was construed in *Dominguez v. Gallmeyer*,[156] where a pre-trial order under Trial Rule 16(J)[157] had been entered. The court noted, according to the language of the rule, that the pre-trial order supplanted the pleadings and controlled the issues for litigation. However, the court determined that the order itself could be amended if the evidence in the case showed that another or a different issue had been raised, and the amendment would conform the pre-trial order to the evidence presented.[158]

D. Parties and Discovery

1. Joinder of Claims.—In *Peterson v. Culver Educational Foundation*,[159] the court of appeals noted the distinction between the compulsory counterclaim under Trial Rule 13(A),[160] and the permissive

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pleading within the time remaining for response to the original pleading or within twenty [20] days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

To grant or to deny leave to amend is a matter of trial court discretion. Hargis v. United Farm Bureau Mut. Ins. Co., 388 N.E.2d 1175 (Ind. Ct. App. 1979). Under IND. R. TR. P. 6(B), a court may allow an answer to be filed 135 days late. Snyder v. Tell City Clinic, 391 N.E.2d 623 (Ind. Ct. App. 1979).

[154]397 N.E.2d at 592.

[155]IND. R. TR. P. 15(B) provides, generally, that an amendment to conform the pleadings to the evidence and to the issues which that evidence raised and tried may be made at any time.

[156]402 N.E.2d 1295 (Ind. Ct. App. 1980). *See also* Davis v. Schneider, 395 N.E.2d 283 (Ind. Ct. App. 1979). *But see* Bahre v. Metropolitan School Dist., 400 N.E.2d 197 (Ind. Ct. App. 1980).

[157]IND. R. TR. P. 16(J) states in part:

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleading, and the agreements made by the parties as to any of the matters considered which limit the issues for trial to those not disposed of by admissions or agreement of counsel, and such order when entered shall control the subsequent course of action, unless modified thereafter to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided, and may either confine the calendar to jury actions or non-jury actions or extend it to all actions.

[158]402 N.E.2d at 1299.

[159]402 N.E.2d 448 (Ind. Ct. App. 1980).

[160]IND. R. TR. P. 13(A) states in part:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if

joinder of claims under Trial Rule 18(A).[161] Suit was brought for the wrongful discharge of the plaintiff, an instructor in the defendant's school, and one count alleging defamation was dismissed without prejudice. After a finding for the plaintiff for breach of contract, the plaintiff commenced the defamation action again, and the question arose whether the former litigation barred the present suit.

The court of appeals held that under Trial Rule 18, the joinder of claims was permissive, and no right was lost if there was no joinder.[162] The language is not mandatory, unlike Trial Rule 13, where, the court observed, the failure to bring a compulsory counterclaim precludes later litigation under the doctrine of res judicata.[163]

2. Joinder of Parties.—In *Lutheran Hospital, Inc. v. Department of Public Welfare*,[164] the Department—defendant maintained the failure to join the Indiana Department of Mental Health and the trustees of the civil townships of Allen County required a dismissal because those parties were, it was argued, indispensable to the litigation.

The court of appeals held that under Trial Rule 19(A)[165] an action

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(1) at the time the action was commenced the claim was the subject of another pending action, or

(2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

[161]IND. R. TR. P. 18(A) provides in part: "A party asserting a claim for relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, whether legal, equitable, or statutory as he has against an opposing party."

[162]402 N.E.2d at 460.

[163]*Id.* (citing Middelkamp v. Hanewich, 364 N.E.2d 1024 (Ind. Ct. App. 1977)).

[164]397 N.E.2d 638 (Ind. Ct. App. 1979). *See* note 46 *supra* and accompanying text (discussion of standing).

[165]IND. R. TR. P. 19(A) provides in part:

A person who is subject to service of process shall be joined as a party in the action if

(1) in his absence complete relief cannot be accorded among those already parties, or

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:

(a) as a practical matter impair or impede his ability to protect that interest or

(b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant.

need not be dismissed merely because an indispensable party has not been joined.[166] The trial court has the discretion under Trial Rule 19 to order that the absent party be made a party, or that the action continue without him. Hence dismissal of the action is not the only remedy available when there is a failure to join an indispensable party.[167]

A consistent holding is found in *Arnold v. Dirrim*,[168] a case dealing with a proceeding supplemental to satisfy a large judgment. The defendant argued that the failure to join the remainderman of a spendthrift trust should cause the judgment to be set aside. The court of appeals held that the defendant's failure to move either before or during trial to join the indispensable "party" constituted a waiver of any error concerning the absence of that "party."[169]

In *Gilstrap v. Gilstrap*,[170] however, a different result was reached. The suit was a partition action, and the court of appeals held that "tenants have the right to a partition of the co-tenancy, along with the right *to a sale of the entire tract* of land in the event that said land is indivisible."[171] The trial court may become involved in adjusting and securing the rights of other interested parties, though, such as a prospective purchaser from the tenants. Here there was such a purchaser, and the trial court's decree purported to secure the purchaser's rights. The court of appeals held that it was reversible error to fail to join the purchaser as a necessary (indispensable) party under Trial Rule 19, while purporting to affect that party's rights.[172]

3. Class Actions.—The court in *Arnold v. Dirrim*,[173] made several important interpretations and holdings concerning class actions. The action was commenced in 1972, and in 1973 the complaint was amended to commence a class action on behalf of certain purchasers of capital stock. The gist of the action was that the sale of the stock was made pursuant to a false and misleading prospectus. The holdings of the appellate court concerning Trial Rule 23 are summarized as follows:

(1) The court held that under Trial Rule 23(B)(3),[174] a common

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[166]397 N.E.2d at 647.

[167]*Id.*

[168]398 N.E.2d 442 (Ind. Ct. App. 1979).

[169]*Id.* at 448.

[170]397 N.E.2d 1277 (Ind. Ct. App. 1979).

[171]*Id.* at 1281.

[172]*Id.*

[173]398 N.E.2d 426 (Ind. Ct. App. 1979). Another aspect of the same general litigation is discussed in the text accompanying note 168 *supra*.

[174]IND. R. TR. P. 23(B)(3) provides that a class action is maintainable if "the court finds that the questions of law or fact common to the members of the class

nucleus of facts was present, and that it satisfied the requirement that questions of law or fact common to the members of the class predominate over questions affecting individual members.[175]

(2) The court determined, under Trial Rule 23(A)(3),[176] that the claims of the plaintiff were representative claims and that they need not be identical claims with the members of the class. The rule demands

> only a showing that the representative plaintiffs' interests are not antagonistic or in conflict with a class as a whole. . . . Under this approach the typicality prerequisite [is] satisfied if the claims or defenses of the representatives and class members stem from a single event or are based on the same legal theory.[177]

(3) The court held that the class action should be treated as such from the time when the amended complaint was filed,[178] which occurred in this case on April 13, 1973, rather than from the time when the trial court certified the case pursuant to a motion for the certification[179] of the class. The significance of this ruling in this case

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predominate over any questions affecting only individual members, and that a class action is superior to other available methods . . . ."

[175]398 N.E.2d at 436.

[176]One of the prerequisites to a class action under Trial Rule 23(A) is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." IND. R. TR. P. 23(A)(3).

[177]398 N.E.2d at 436-37 (citation omitted).

[178]*Id.* at 440.

[179]IND. R. TR. P. 23(C)(1) requires that the trial court shall determine, "[a]s soon as practicable after the commencement of an action brought as a class action . . . whether it is to be so maintained." An order to that effect may be made conditional, and may be altered or amended before the decision on the merits. The determination made by the trial court embraces all of the requirements of the class action, and that can mean that the plaintiff or party asserting the class action claim must make a substantial showing. For example, in Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), the plaintiff brought suit and asked that she be named as the representative of a class which would have constituted all persons who were enrolled at the Highland High School and Highland Junior High School who were the subject of allegedly improper activity. That activity concerned a search of students for drugs which were being used in school. The federal district court denied the certification of the class, holding that the plaintiff had failed to meet the "numerosity" requirement, and that it was clear that many students in the school were not in sympathy with plaintiff's suit and that plaintiff could not represent them. *Id.* at 1028. In another case, Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979), the plaintiff failed to allege that the class was so numerous that joinder of all members was impractical, and certification was refused. The class might have included only those special education students actually suspended or expelled by the School City of Mishawaka, Indiana; there were too few members of this class to permit the class action to be maintained.

was that the relevant statute of limitations had not run at the time the amended class action was filed.

(4) The appellate court sustained an award of attorney fees in the amount of $112,267.00, and it observed that certain evidence in the trial court was to the effect that it is common practice in class action suits to award attorney fees in the amount of 33% of all the recovery or the settlement fund.[180]

In *Louisville & Nashville Railroad v. Wollenmann*,[181] a class action was certified against the railroad in a suit alleging damages from tanker cars of liquid propane which overturned in the railroad yard. An appeal was taken from that certification under Appellate Rule 4(B)(5).[182]

On appeal the defendant argued that the named plaintiffs operated a business in the vicinity, but sought to represent persons evacuated from their homes, and therefore their claims were not typical of those of all members of the class, as required under Trial Rule 23(A)(3). However, the court, citing extensive federal authority, held that the claims of the class representatives need not be identical to the claims of the members of the class.[183]

The defendant also argued that under Trial Rule 23(B)(3) the questions of fact and law common to the members of the class did not predominate over any questions affecting only individual members of the class. In response, the court of appeals stated that "[a]ssuming, arguendo, that damages will have to be proved for each class member, certainly the larger issue will the question of negligent conduct"[184] of the railroad, a question common to all members of the class.

The court also commented that the absence of attempted intervention by other members of the class did not eliminate the danger of multiple litigation as argued by the defendant.[185]

4. Intervention.—In *Lawyers Title Insurance Corp. v. C & S Lathing and Plastering Co.*,[186] Lawyers Title attempted intervention after the satisfaction of a judgment and the dismissal of a suit. It had not been a party, but had become liable for payment of the judgment. The motion was made under Trial Rule 24(C),[187] which pro-

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[180]398 N.E.2d at 441.

[181]390 N.E.2d 669 (Ind. Ct. App. 1979).

[182]IND. R. APP. P. 4(B)(5) permits the appeal of an interlocutory order which is not appealable as a matter of right, if the conditions in that rule have been met.

[183]390 N.E.2d at 670.

[184]*Id.* at 672.

[185]*Id.* at 672 & n.3.

[186]403 N.E.2d 1156 (Ind. Ct. App. 1980).

[187]IND. R. TR. P. 24(C) states in part:

A person desiring to intervene shall serve a motion to intervene upon the

vides for intervention after judgment, for the purpose of filing a motion under Trial Rule 60. The court of appeals held that obtaining permission to intervene is a prerequisite for filing a Trial Rule 60 motion.[188] However, the appellate court determined that the trial court had erred in failing to hold a hearing on the motion to intervene. That question had been preserved for review on appeal. The opinion was not clear as to just what final judgment was being appealed if the motion under Trial Rule 60 is not allowed until one has been granted permission to intervene.

Nevertheless, the court of appeals established the following test for intervention, saying:

> In *Hinds v. McNair*, . . . the Third District of this court adopted the following threefold test used by most federal courts in determining whether intervention should be granted under Fed. R. Civ. P. 24(a)(2) (1966), which is similar to T.R. 24(A)(2):
>
> > "(1) the assertion of interest in the subject of the action, (2) a possibility that the disposition of the action may as a practical matter impede protection of the interest, and (3) inadequacy of representation of the interest by existing parties. . . ."
>
> Furthermore, T.R. 24(A) expressly states that a motion for intervention of right must be timely. C & S and Sanborn have vigorously argued that Lawyers Title's motion was not timely. Our examination of the record of this case, however, leads us to the conclusion that the information available to the trial court was inadequate to make a determination of timeliness. It is not clear, for example, when Lawyers Title first learned of its potential liability under the insurance policy it had issued or when it first had reason to believe that the so-called partial satisfaction may have been intended to be a satisfaction and accord.[189]

These standards were further explained in *E.N. Maisel & Associates v. Canden Corp.*,[190] where the court of appeals stated that

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parties as provided in Rule 5. The motion shall state the grounds therefor and set forth or include by reference the claim, defense or matter for which intervention is sought. Intervention after trial or after judgment for purposes of a motion under Rules 50, 59, or 60, or an appeal may be allowed upon motion. The court's determination upon a motion to intervene may be challenged only by appeal from the final judgment or order in the cause.

[188]403 N.E.2d at 1158.

[189]*Id.* at 1159 (citations omitted).

[190]398 N.E.2d 1366 (Ind. Ct. App. 1980).

"[t]he facts alleged in a motion to intervene must be taken as true [and the] merits of the claim are not to be determined . . . , at least in the absence of sham, fraud or other similar objections."[191] In *Maisel*, the court held[192] that the interest of a contract purchaser in a shopping center was sufficient for purposes of intervention under Trial Rule 24(A)(2).[193]

5. Discovery.—In *Gumz v. Starke County Farm Bureau Co-operative Association*,[194] the supreme court reaffirmed its decision in *Augustine v. First Federal Savings & Loan Association*,[195] and held that a deposition must be "published"[196] before it can be used by the trial court or by the court of appeals.[197] Unless a motion is made and granted to publish the deposition, the contents of the deposition cannot be considered by the court. In *Gumz*, the trial court had considered the depositions without a motion to publish having been filed, but the supreme court held that any error was waived because the trial court later entered an order publishing the depositions and no party objected to that procedure.[198] Thus the depositions could be considered in the trial court and also on appeal.

Trial Rule 32 was interpreted again in its federal rule form[199] in *Oberlin v. Marlin American Corp.*,[200] where the district court excluded

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[191]*Id.* at 1367-68.

[192]*Id.* at 1368.

[193]IND. R. TR. P. 24(A) provides in part:

> Upon timely motion anyone shall be permitted to intervene in an action
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> (1) when a statute confers an unconditional right to intervene; or
>
> (2) when the applicant claims an interest relating to a property, fund or transaction, which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest in the property, fund or transaction, unless the applicant's interest is adequately represented by existing parties.

During this survey period, the substitution of a party for another under IND. R. TR. P. 25 received a brief comment in Braun v. Loshe, 390 N.E.2d 189 (Ind. Ct. App. 1979). The court of appeals observed that the transfer of an interest subsequent to the commencement of the action may allow the substitution of the person to whom the interest was transferred, but that substitution is not required under Trial Rule 25(C). 390 N.E.2d at 192. The action may be continued by or against the original party in the trial court's discretion. *Id.*

[194]395 N.E.2d 257 (Ind. 1979), *vacating* 383 N.E.2d 1061 (Ind. Ct. App. 1978).

[195]384 N.E.2d 1018 (Ind. 1979), *questioned in* Harvey, *1979 Survey*, *supra* note 9, at 73. The holding in *Gumz* merely accepts *Augustine*. IND. R. TR. P. 32 does not require "publication" and the procedure was not continued after the 1970 adoption of the rules. The requirement for publication appears to have been revived by these decisions.

[196]"Publication means the breaking of the sealed envelope containing the [deposition] and making it available for use by the parties or the court." 384 N.E.2d at 1020. "This is done by order of the court upon motion of any person or party interested." *Id.*

[197]395 N.E.2d at 260.

[198]*Id.*

[199]FED. R. CIV. P. 32.

[200]596 F.2d 1322 (7th Cir. 1979).

parts of a deposition containing the cross-examination of Oberlin by his own counsel; the cross-examination was conducted by leading questions.[201] Oberlin's attorney argued that no objection was made to the form of the question during the deposition, and the failure to object constituted a waiver. The circuit court agreed and held that the failure to object to the form of the question at the time of the deposition waived that ground for objection at trial.[202]

a. Attorney-client privilege and work product.—The attorney-client privilege, in relation to discovery, was interpreted in *Estate of Voelker*.[203] The trial court had ordered discovery of copies of unsigned wills allegedly in the possession of the deceased's attorney. On interlocutory appeal, the claimant argued that under Indiana law, the attorney-client privilege is waived or terminated after death with regard to an executed will so that the testamentary intent may be established. The appellate court reversed, however, pointing out that no will was executed, and that all preliminary documents clearly fell within the attorney-client privilege.[204]

In a criminal case, *George v. State*,[205] the state filed a discovery motion in which it requested that the defendant produce statements of any witness to be called by the defendant and copies of memoranda by those witnesses. The defendant objected on the ground that the materials constituted work product of the defendant's attorney. The court of appeals sustained the defendant's objection. The court held that the "witness statements taken by the defendant, his attorney, or his agents in anticipation of litigation are not subject to pre-trial discovery by the prosecution over a timely work-product objection."[206] The appellate court held that the trial court had clearly abused its discretion when it ordered the defendant to produce the statements.[207]

b. Protective orders.—In *Geib v. Estate of Geib*,[208] a resident of Pennsylvania was appointed by the Lake Superior Court as coadministrator of the estate of Stanley R. Geib. The estate's total assets appeared to be less than $5,500. Lora Geib served notice of

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[201]Under federal evidence law, no one has an absolute right to ask leading questions on cross-examination. *Id.* at 1328 (citing FED. R. EVID. 611(c)).

[202]596 F.2d at 1328.

[203]396 N.E.2d 398 (Ind. Ct. App. 1979).

[204]*Id.* at 399.

[205]397 N.E.2d 1027 (Ind. Ct. App. 1979). An important statement of policy concerning discovery in criminal cases is found in Gutierrez v. State, 395 N.E.2d 218 (Ind. 1979). The particular form of discovery in criminal cases is left largely to the discretion of the trial court. *Id.* at 223.

[206]397 N.E.2d at 1035.

[207]*Id.*

[208]395 N.E.2d 336 (Ind. Ct. App. 1979).

her intention to take the deposition of the Pennsylvania resident in Munster, Indiana. Motions to strike the notice and for a protective order[209] were granted by the trial court, and affirmed on appeal. The appellate court emphasized, as the trial court did, that the estate's assets would be unduly depleted by the travel expenses, and that an alternative method must be used.[210]

c. Trial Rules 36 and 37.—In *Justak v. Bochnowski*,[211] the plaintiff, acting pro se, had her complaint dismissed with prejudice under Trial Rule 37(B).[212] The court of appeals affirmed,[213] holding that when "(1) a party has in bad faith and abusively resisted or obstructed discovery, and (2) the conduct of that party has [threatened] to so delay or obstruct the rights of the opposing party that any other relief would be inadequate,"[214] the severe sanction of dismissal is proper. The court noted that the plaintiff had failed to appear for scheduled hearings and depositions after she had notice. She also had failed to comply with the trial court's requests that she substantiate her claims of illness, which she offered as her excuse for not complying with the discovery requests and orders.[215]

In *Pathman Construction Co. v. Drum-Co Engineering Corp.*,[216] the defendant failed to answer certain requests for admissions under Trial Rule 36,[217] and the trial court entered a summary judgment for plaintiff because of those admissions. The court of appeals held that once the time limitation specified in the request for admissions under Trial Rule 36[218] has passed, the statements are admitted by operation of law.[219] Additionally, no motion is required to effect those admissions and if one is made, it is superfluous.[220] Finally, the court pointed out that relief might be obtained from the admission

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[209]*See* IND. R. TR. P. 26(C).

[210]395 N.E.2d at 338.

[211]391 N.E.2d 872 (Ind. Ct. App. 1979). *See also* Hawkins v. Means Auto, Inc., 403 N.E.2d 1106 (Ind. Ct. App. 1980) (the plaintiff's complaint was dismissed after he had failed to comply with a court order to answer an interrogatory under Trial Rule 33).

[212]IND. R. TR. P. 37(B)(4) allows a court to dismiss a complaint with prejudice against a party who fails to comply with the court's orders concerning discovery.

[213]391 N.E.2d at 878.

[214]*Id.* at 876.

[215]*Id.*

[216]402 N.E.2d 1 (Ind. Ct. App. 1980).

[217]IND. R. TR. P. 36(A) provides that the matter in the request for an admission "is admitted unless, within a period designated in the request, not less than thirty [30] days after service thereof . . ., the party to whom the request is directed" responds as required by the rule.

[218]*Id.*

[219]402 N.E.2d at 5.

[220]*Id.* at 6.

under Trial Rule 36(B),[221] but if that procedue is not followed, there is no cause for complaint on appeal.[222]

d. Admissibility of copies of documents and Trial Rule 34.—In *Smith v. City of South Bend*,[223] suit was brought by the plaintiffs to secure certain retirement benefits. The plaintiffs gave notice to the city under Trial Rule 34[224] to produce certain job descriptions and related documents. The city produced a copy of the fire department job classification manual. It was later offered into evidence and the city objected, claiming that the document offered was not the best evidence and not properly authenticated. The trial court sustained the objections.

The court of appeals held that sustaining those two objections was erroneous because it is manifestly unfair to sustain an objection to the admission of a copy of a document on the ground that it is not the best evidence or properly authenticated, when the party making the objection also produced the document pursuant to a Trial Rule 34 request.[225] The court of appeals cited Trial Rule 34(D)[226] which contemplates the waiver of any objection on the basis of either the best evidence rule or proper authentication of the document, when the party has produced the document pursuant to a request.[227]

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[221]IND. R. TR. P. 36(B) states in part:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

The defendant attempted to attack the trial court's order finding the matter admissible by moving under Trial Rule 60(B), but the court of appeals held that the trial court's order was interlocutory and could not be attacked under Trial Rule 60. 402 N.E.2d at 6.

[222]402 N.E.2d at 6.

[223]399 N.E.2d 846 (Ind. Ct. App. 1980).

[224]The procedure for giving notice to produce a document is established under IND. R. TR. P. 34(B), and the allowable scope of the production is defined under IND. R. TR. P. 34(A).

[225]399 N.E.2d at 851.

[226]IND. R. TR. P. 34(D) states in part:

> When a party or witness in control of a writing or document subject to examination under this rule or Rule 9.2(E) refuses or is unable to produce it, evidence thereof shall be allowed by other parties without compliance with the rule of evidence requiring production of the original document or writing as best evidence.

[227]399 N.E.2d at 851.

E. Trial and Judgment

1. Trial By Jury.—The Indiana Judicial Report for 1979[228] shows that 69,483 plenary jurisdiction civil cases, not including small claims cases, were disposed of in 1979. Of those, the *Report* shows that 831 were disposed of by civil jury trials, and 14,176 by civil bench trials.

The court of appeals in *Farmers Bank & Trust Co. v. Ross*,[229] in its interpretation of Trial Rule 38(A),[230] would further curtail the right to a jury trial. The plaintiff brought suit to foreclose a mortgage on certain real estate, and the defendant counterclaimed for damages alleging a breach of contract. The case was submitted to a jury over objection of the plaintiff. The court of appeals held that once equity had jurisdiction, even a counterclaim at law must be tried in equity and there would be no right to a jury trial on the damage claim.[231]

2. Involuntary Dismissals.—An important decision under Trial Rule 41(B)[232] should be noted. It represents a significant reconsideration of the previous interpretations in the court of appeals on this rule.[233]

In *Ferdinand Furniture Co. v. Anderson*,[234] suit was brought

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[228]DIVISION OF STATE COURT ADMINISTRATION, INDIANA JUDICIAL REPORT (1979). The pages of this REPORT which are referred to in the text are set out in full as an Appendix to this Article.

[229]401 N.E.2d 74 (Ind. Ct. App. 1980).

[230]IND. R. TR. P. 38(A) states in part:

> Issues of law and issues of fact in causes that prior to the eighteenth day of June, 1852, were of exclusive equitable jurisdiction shall be tried by the court; issues of fact in all other causes shall be triable as the same are now triable. In case of the joinder of causes of action or defenses which, prior to said date, were of exclusive equitable jurisdiction with causes of action or defenses which prior to said date were designated as actions at law and triable by jury—the former shall be triable by the court, and the latter by a jury, unless waived; the trial of both may be at the same time or at different times, as the court may direct.

The time for requesting a jury trial can be extended under IND. R. TR. P. 6(B)(2). Johnson v. Wabash County, 391 N.E.2d 1139 (Ind. Ct. App. 1979).

[231]401 N.E.2d at 76.

[232]IND. R. TR. P. 41(B).

[233]The discussion of this subject, between this writer and the court of appeals, has appeared before. *See* Harvey, *1979 Survey*, *supra* note 9, at 76-78 & n.167. IND. R. TR. P. 41(B) provides for the involuntary dismissal of a case tried to the court, upon a motion which attacks the evidence of the nonmoving party. This writer has maintained that the court of appeals has erred in developing a standard of interpretation which has effectively removed fact-finding power from the trial courts in Indiana. That is an interpretation which the court has admitted, but the court maintains that even if the interpretation is incorrect, it cannot be changed except by rule amendment.

[234]399 N.E.2d 799 (Ind. Ct. App. 1980).

against the defendant due to a fire which destroyed a building and its contents. The plaintiff had purchased a heating unit from the defendant; the unit allegedly malfunctioned and caused the fire. At the close of the plaintiff's evidence, the defendant moved to dismiss under Trial Rule 41(B). The trial court overruled, noting that it was the tral court's understanding that in ruling on a Trial Rule 41(B) motion it was unable to weigh the evidence. However, the trial court also determined that the evidence and inferences therefrom were not sufficient to sustain the allegations of any count in the complaint. The trial court told the defendant that it could proceed with its defense, but that if the defendant rested at that point there would be a judgment for the defendant on all counts in the complaint.

The court of appeals, after reviewing the development of the holdings under Trial Rule 41(B), sustained the trial court,[235] and pointed out a very important distinction. Under Trial Rule 41(B), unlike Trial Rule 50, the judge is the ultimate fact finder on the merits of the cause. Under Trial Rule 41(B), the trial court must give every reasonable inference and favorable determination to the evidence of the nonmoving party in order to determine whether the nonmoving party has established a prima facie case. Nevertheless, the trial judge is charged with the responsibility of determining the ultimate facts on the merits of the case. Thus, although a prima facie case might be established by the proponent of the evidence, if the trial court is not satisfied that the party has carried its ultimate evidentiary burden, the trial court, under Trial Rule 41(B), may find against the party which has established its prima facie case.

In short, the trial court under Trial Rule 41(B) is the ultimate finder of fact, and it may find against a plaintiff who has carried his burden of producing evidence to show a prima facie case. The court can make that finding without requiring the moving party to put on evidence.

3. Separation of Claims for Trial.—In *Dayton Walther Corp. v. Caldwell*,[236] a case arising from an automobile accident, the trial court allowed a defendant to implead a third-party defendant. After the third-party defendant had filed a responsive pleading, it requested a severance of the claim against it from the original suit. The trial court ordered a separate trial after determining that the

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[235] *Id.* at 803-06.

[236] 389 N.E.2d 723 (Ind. Ct. App. 1979). The court of appeals decision on the issue of separate trials was expressly affirmed in the supreme court although the trial court's decision as to damages was sustained and the court of appeals' decision on damages was vacated. 402 N.E.2d 1252, 1259 (Ind. 1980). *See also* note 357 *infra*.

indemnification question would present too many complications at trial on the original claim.

In an interpretation of Trial Rule 42(B)[237] and Trial Rule 14(C),[238] the appellate court held that the fact that a trial court had permitted a third-party defendant action to be filed did not prevent reassessment of the complexity of the claims.[239] This is especially true where a pre-trial conference had enabled the court to narrow the issues for trial, and the order separating the claims was quite appropriate.[240]

4. Voir Dire Examination, Preliminary Instructions and Contempt of Court.—In *Sims v. Huntington*,[241] the question arose whether the trial court erred in refusing counsel an opportunity to orally interrogate the jurors. The supreme court stated that "the trial judge has wide discretion in arranging and conducting a proper voir dire [examination, and that Trial Rule 47(A)] does not require verbal questioning by the parties."[242] The court observed that attorneys for the parties are permitted to supplement an examination of prospective jurors by the trial court in any manner (such as by written questions submitted to the trial judge) which reasonably produces answers to the questions. Thus there is no absolute right to orally interrogate a jury during voir dire examination.

In *Drake v. State*,[243] a criminal conviction for a felony was reversed because the trial judge did not give either preliminary or final instructions to the jury. Rather the trial judge gave the instructions to the jury foreman and instructed him to read both sets

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[237]IND. R. TR. P. 42(B) states in part:
The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury.

[238]IND. R. TR. P. 14(C) states in part:
With his responsive pleading or by motion prior thereto, any party may move for severance of third-party claim or ensuing claim as provided in this rule or for a separate trial thereon. If the third-pary defendant is a proper party to the proceedings under any other rule relating to parties, the action shall continue as in other cases where he is made a party.

[239]389 N.E.2d at 734.

[240]*Id.*

[241]393 N.E.2d 135 (Ind. 1979).

[242]*Id.* at 139. IND. R. TR. P. 47(A) states in part: "The court shall permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by further inquiry."

[243]393 N.E.2d 148 (Ind. 1979).

of instructions to the jury before the jury began its deliberations. The supreme court held that that was reversible error.[244] The court further held that the failure of the trial court to instruct the jury in open court violated Indiana Trial Rule 51[245] and Indiana statutory law;[246] the duty to give those instructions could not be delegated to the jury foreman.[247]

In *Skolnick v. State*,[248] a witness showed direct contempt to a trial court and was convicted of that contempt by the court. In an extensive opinion on the law on the subject, the court of appeals held that under Indiana law,[249] a trial judge "must set out in writing a 'distinct' statement describing the allegedly contumacious conduct and any statement of the alleged contemnor made in denial, explanation or extenuation."[250] A trial judge's conclusory recital of the conduct is not sufficient, because the statement is to serve the dual purposes of providing the contemnor with a concise record of the reason for the contempt and providing a reviewing court a clear statement of the nature of the conduct.

The court observed that in the present case no such statement was made but determined that the lack of the statement did not warrant reversal because the contempt was easily discerned from the nature of the conduct shown by the transcript of the proceedings before the trial court.[251]

5. Motions for Judgment on the Evidence.—In *Amos v. Keplinger*,[252] the plaintiff brought a negligence action against the defendant but the jury returned a verdict against the plaintiff. The trial court, upon motion duly made, entered a judgment against the defendants notwithstanding the jury's verdict.[253] The court of appeals stated that the trial court did have authority "to enter a judgment imposing liability in favor of a party having the burden of proof and contrary to that imposed by the jury's verdict."[254]

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[244]*Id.* at 149 (citing Williams v. State, 269 Ind. 430, 381 N.E.2d 458 (1978), *cert. denied*, 100 S. Ct. 1328 (1980) and Purdy v. State, 267 Ind. 282, 369 N.E.2d 633 (1977)).

[245]IND. R. TR. P. 51(A) sets out those instructions which the trial court must give to the jury at the commencement of the action, and IND. R. TR. P. 51(B) refers to instructions which the trial court must give to the jury after arguments.

[246]IND. CODE § 35-1-35-1 (1976).

[247]393 N.E.2d at 149. The judge could not even ensure that the instructions were given under such a delegation.

[248]388 N.E.2d 1156 (Ind. Ct. App. 1979).

[249]IND. CODE § 34-4-7-7 (1976).

[250]388 N.E.2d at 1163.

[251]*Id.* at 1164.

[252]397 N.E.2d 1010 (Ind. Ct. App. 1979).

[253] *See* IND. R. TR. P. 50(A).

[254]397 N.E.2d at 1011 (citing State v. Bedwell, 371 N.E.2d 709 (Ind. 1978)).

Trial Rule 50(A)(3)[255] was interpreted in *Keck v. Kerbs*,[256] an automobile accident case. At the close of the presentation of all the evidence, the trial court granted Kerb's motion for judgment on the evidence. The evidence concerned a charge of wanton negligence. The court of appeals held that issues of fact for the jury were present,[257] and stated that the "motion may be granted only if there is no substantial evidence or reasonable inference to be adduced therefrom to support an essential element of the claim. . . . [I]f reasonable persons might differ, then judgment on the evidence is improper."[258]

6. Default Judgments.—Several opinions have given important interpretations to Trial Rule 55.[259] In *Martin v. Indianapolis Morris Plan Corp.*[260] the plaintiff Morris Plan brought suit to satisfy judgment which was previously obtained against Martin. Martin filed a motion to dismiss and in the alternative for preferred venue, and the trial court denied the motion. The defendant thereafter failed to participate in the litigation. The plaintiff gave more than the required three days' notice of its intention to apply for a default judgment and then applied for and obtained a default judgment. The defendant had received proper and timely notice of all events relevant to the litigation. Within the sixty day time limit of Trial Rule 59,[261] the defendant filed a motion to correct error. The court of appeals noted that the motion to correct error is a proper vehicle to challenge a default judgment if it is timely filed.[262] The court held that the default judgment was properly entered pursuant to Trial Rule 55.[263]

In *Hurt v. Polak*,[264] a taxpayer brought suit for a refund of property tax overpayments. A cross complaint was filed by the county

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[255]IND. R. TR. P. 50(A)(3) states that a party may move for judgment on the evidence after all the evidence in the case has been presented and before judgment has been entered.

[256]395 N.E.2d 845 (Ind. Ct. App. 1979).

[257]*Id.* at 850.

[258]*Id.* at 846. The leading Indiana decision is Huff v. Travelers Indem. Co., 266 Ind. 414, 363 N.E.2d 985 (1977), *discussed in* Harvey, *1977 Survey*, *supra* note 9, at 66-67.

[259]IND. R. TR. P. 55 provides, generally, for the determination and the entry of default judgments, and it establishes that such judgments may be set aside under IND. R. TR. P. 60(B) according to the grounds found in that trial rule.

[260]400 N.E.2d 1173 (Ind. Ct. App. 1980).

[261]IND. R. TR. P. 59(C) requires that a motion to correct error "be filed not later than sixty [60] days after the entry of a final judgment or an appealable final order." "Finality" under this Rule is discussed in the text accompanying note 308 *infra*.

[262]400 N.E.2d at 1174 n.1. *Accord*, Munden v. Munden, 398 N.E.2d 680 (Ind. Ct. App. 1979); Protective Ins. Co. v. Steuber, 370 N.E.2d 406 (Ind. Ct. App. 1977).

[263]400 N.E.2d at 1177.

[264]397 N.E.2d 1051 (Ind. Ct. App. 1979).

auditor which the taxpayer failed to answer for thirteen months. One day after the auditor had filed a motion for default judgment on the cross complaint, the answer was filed; the trial court permitted the answer. The court of appeals stated that "[w]hen a party fails to file a timely answer and answers only after the filing of a motion for default judgment, the trial court remains vested with power to exercise its discretion" by accepting the answer, and thereby denying the default judgment.[265] The only issue on appeal is whether the trial court abused that discretion or committed reversible error which prejudiced the party moving for the default judgment.[266]

The case of *Snyder v. Tell City Clinic*[267] is similar. A medical malpractice action was filed and the plaintiffs moved for a default judgment against the defendants who had appeared but had not answered the complaint. The defendants moved to extend the time for answering the complaint to the day of the hearing on the default judgment motion; the trial court granted the defendant's motion. The answer was thus filed 135 days late, but the court of appeals sustained the trial court's decision, holding that Trial Rule 6[268] provides the court with discretion to extend the time for the filing of pleadings.[269] Here, the trial court had acted properly in denying the motion for a default judgment because of the substantial amounts of money at issue and the extent of the parties' ongoing discovery.[270]

Stewart v. Hicks[271] is a leading opinion on default judgments occurring after an attorney has withdrawn from the case. Stewart brought suit against Hicks who was apparently represented by three different sets of attorneys, all of whom withdrew from the case. Thereafter no other attorney appeared for Hicks, and eventually the trial court entered a default judgment against him awarding $50,000.00 damages and other relief. The appeal arose after the filing of a Trial Rule 60(B) motion, alleging that no notice of a default hearing was given to Hicks. Relief from the judgment was given by the trial court on the basis of excusable neglect. The court of appeals reversed, holding that Hicks was not entitled to notice under 55(B)[272] because he had no appearance on file, either pro se or by

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[265]*Id.* at 1053.

[266]*Id.*

[267]391 N.E.2d 623 (Ind. Ct. App. 1979).

[268]IND. R. TR. P. 6(B).

[269]391 N.E.2d at 627.

[270]*Id.*

[271]395 N.E.2d 308 (Ind. Ct. App. 1979).

[272]IND. R. TR. P. 55(B) states, in part, that if a default judgment is sought against a party who has appeared in the action, then the party "shall be served with written notice of the application for judgment at least three [3] days prior to the hearing on such application."

counsel, and accordingly the notice provision requiring three days notice prior to a hearing on an application for default was not applicable to Hicks.[273]

The court further observed that "default judgments actually consist of two stages . . . : (1) the entry of default and (2) the entry of the appropriate relief including damages."[274] The court stated that "[a]n entry of default is interlocutory until it determines all the rights of the parties at which time it becomes a final judgment."[275] Nevertheless, consistent with the January 1, 1980 amendments to the trial rules,[276] the default entry can be appealed by filing a Trial Rule 60(B) motion.

The court held that no hearing on the damages question was required when the damages were for a sum certain and liquidated, but that if a judgment is obtained by default and the damages are unliquidated or not otherwise determined, then the defaulted defendant may still appear and be heard concerning the amount of damages which results from the interlocutory entry of default.[277] Additionally, there is the right to a jury trial on the issue of damages in this setting.[278]

The court discussed the problem which may occur, namely, that evidence which a defaulted defendant might offer could be seen as an attempt to impeach the underlying default. The court concluded that the trial court was correct in allowing the defendant, pursuant to Trial Rule 60(B)(8),[279] to have a hearing on the damages portion of the judgment. The court of appeals observed that the entry of a $50,000.00 default judgment was not sustained by the allegations in the complaint. Hence, the damages stage of the default proceeding was remanded to the trial court with instructions to provide the parties with a hearing to determine the amount of damages to which the plaintiff was entitled. The other stage of the proceeding, the entry of default against the defendant, was not set aside, and could not be set aside upon the record.[280] This writer would observe that, in circumstances such as these, the two distinct stages found in Trial Rule 55 are very important and should be carefully noted.

In *Justak v. Bochnowski*,[281] the clerk of the court, without refer-

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[273]395 N.E.2d at 312.

[274]*Id.*

[275]*Id.*

[276]*Id.* at 312 n.2. *See* notes 88-89 *supra* and accompanying text.

[277]395 N.E.2d at 312.

[278]*Id.*

[279]IND. R. TR. P. 60(B)(8) provides that the court may allow relief from a default judgment for any justifiable reason.

[280]395 N.E.2d at 312.

[281]391 N.E.2d 872 (Ind. Ct. App. 1979).

ring the matter to the judge, "signed a document entitled 'Judgment by Default,' which purported to award [the plaintiff] a judgment of one million dollars."[282]

The court of appeals held that under Trial Rule 55(A) a judgment by default can be entered only by the trial court, not the clerk of the court.[283] The latter can enter, without the intervention of the court, an "entry of default" but not a judgment.[284]

F. Appeals

1. Motion to Correct Error: 1980 Revision.—The supreme court approved an amendment to Trial Rule 59.[285] Because a motion to cor-

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[282]*Id.* at 877.

[283]*Id.*

[284]*Id.*

[285]IND. R. TR. P. 59 (amended effective Jan. 1, 1980) now provides:

(A) Motion to correct error—Bases for. The bases for a motion to correct error are established, without limitation, as follows:

(1) Denial of a fair trial by any irregularity in the proceedings of the court, jury or prevailing party, or any order of court, abuse of discretion, misconduct of the jury or prevailing party;

(2) Accident or surprise which ordinary prudence could not have guarded against;

(3) Excessive or inadequate damages, amount of recovery or other relief;

(4) The verdict or decision is not supported by sufficient evidence upon all necessary elements of a claim or defense, or is contrary to the evidence specifically pointing out the insufficiency or defect;

(5) Uncorrected error of law occurring and properly raised in the proceedings or prior to, at or subsequent to the trial;

(6) Newly discovered material evidence which could not, with reasonable diligence have been discovered and produced at the trial;

(7) Correction of a judgment subject to correction, alteration, amendment or modification; or

(8) The verdict or decision being contrary to law specifically pointing out the insufficiency or defect;

(9) For any reason allowed by these rules, statute or other law.

(B) Filing of motion. The motion to correct error may be made by the trial court, or by any party.

(C) Time for filing: Service on judge. A motion to correct error shall be filed not later than sixty [60] days after the entry of a final judgment or an appealable final order. A copy of the motion to correct error shall be served, when filed, upon the judge before whom the case is pending pursuant to Trial Rule 5.

(D) Errors raised by motion to correct error, and content of motion.

(1) Errors Raised by Motion to Correct Error. A motion to correct error shall be addressed to those errors claimed to have occurred prior to the filing of the motion.

(2) Content of Motion. In all cases in which a motion to correct error is made, such motion shall separately state the error or errors which are claimed.

rect error is a prerequisite to the appeal of any final order or judgment, the amendment is extraordinarily important.

The error claimed is not required to be stated under, or in the language of the bases for the motion allowed by this rule, by statute, or by other law. Each claimed error shall be stated in specific rather than general terms, and shall be accompanied by a statement of the facts and grounds upon which the errors are based.

(E) Motion to correct error granted. A party who is prejudiced by any modification or setting aside of a final judgment or an appealable final order following the filing of a motion to correct error may appeal that ruling without filing a motion to correct error.

(F) Denial of motion to correct error, and assertion of grounds for relief.

(1) Following the filing of a motion to correct error, a party who opposes the motion may file a statement in opposition to the motion to correct error not later than fifteen [15] days after service of the motion. The statement in opposition may assert grounds which show that the final judgment or appealable final order should remain unchanged, or the statement in opposition may present other grounds which show that the party filing the statement in opposition is entitled to other relief.

(2) If a motion to correct error is denied, the party who prevailed on that motion may, in his appellate brief and without having filed a statement in opposition to the motion to correct error in the trial court, first assert grounds entitling him to relief in the event the appellate court concludes that the trial court erred in denying the motion to correct error. If the appellate court reverses the judgment of the trial court, nothing in these Rules or the Appellate Rules precludes the appellate court from determining that the appellee is entitled to any alternative relief which the appellee has requested.

(G) Motion to correct error based on evidence outside the record.

(1) When a motion to correct error is based upon evidence outside the record, the motion shall be supported by affidavits showing the truth of the grounds set out in the motion and the affidavits shall be served with the motion.

(2) If a party opposes a motion to correct error made under this subdivision, that party has fifteen [15] days after service of the moving party's affidavits and motion, in which to file opposing affidavits.

(3) If a party opposes a motion to correct error made under this subdivision, that party has fifteen [15] days after service of the moving party's affidavits and motion, in which to file its own motion to correct errors under this subdivision, and in which to assert relevant matters which relate to the kind of relief sought by the party first moving to correct error under this subdivision.

(4) No reply affidavits, motions, or other papers from the party first moving to correct errors are contemplated under this subdivision.

(H) Costs in the event a new trial is ordered. The trial court, in granting a new trial, may place costs upon the party who applied for the new trial, or a portion of the costs, or it may place costs abiding the event of the suit, or it may place all costs or a portion of the costs on either or all parties as justice and equity in the case may require after the trial court has taken into consideration the causes which made the new trial necessary.

(I) Relief granted on motion to correct error. The court, if it determines that prejudicial or harmful error has been committed, shall take such

The new rule retains much of the law found in *P-M Gas & Wash Co. v. Smith*.[286] However, there are some modifications of that opinion. Generally, it is still the law that one motion to correct error must be made by one party to effect an appeal from a final judgment or an "appealable final order."[287] It is no longer the law, however, that a party cannot raise on appeal an error or a question from the trial court, unless it first presents the error to the trial court in the form of a motion to correct error.[288] In fact, only when

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action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the errors:

(1) Grant a new trial;

(2) Enter final judgment;

(3) Alter, amend, modify or correct judgment;

(4) Amend or correct the findings or judgment as provided in Rule 52(B);

(5) In the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages, grant a new trial, or grant a new trial subject to additur or remittitur;

(6) Grant any other appropriate relief, or make relief subject to condition; or

(7) In reviewing the evidence, the court shall grant a new trial if it determines that the verdict of a non-advisory jury is against the weight of the evidence; and shall enter judgment, subject to the provisions herein, if the court determines that the verdict of a non-advisory jury is clearly erroneous as contrary to or not supported by the evidence, or if the court determines that the findings and judgment upon issues tried without a jury or with an advisory jury are against the weight of the evidence.

In its order correcting error the court shall direct final judgment to be entered or shall correct the error without a new trial unless such relief is shown to be impracticable or unfair to any of the parties or is otherwise improper; and if a new trial is required it shall be limited only to those parties and issues affected by the error unless such relief is shown to be impracticable or unfair. If corrective relief is granted, the court shall specify the general reasons therefor. When a new trial is granted because the verdict, findings or judgment do not accord with the evidence, the court shall make special findings of fact upon each material issue or element of the claim or defense upon which a new trial is granted. Such finding shall indicate whether the decision is against the weight of the evidence or whether it is clearly erroneous as contrary to or not supported by the evidence; if the decision is found to be against the weight of the evidence, the findings shall relate the supporting and opposing evidence to each issue upon which a new trial is granted; if the decision is found to be clearly erroneous as contrary to or not supported by the evidence, the findings shall show why judgment was not entered upon the evidence.

[286]268 Ind. 297, 375 N.E.2d 592 (1978), *discussed in* Harvey, *1979 Survey, supra* note 9, at 81-85 *and in* Harvey, *Civil Procedure and Jurisdiction, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 67-68 (1979) [hereinafter cited as Harvey, *1978 Survey*].

[287]IND. R. TR. P. 59(C). All references are to sections in the amended rule, which is set forth in note 285 *supra*.

[288]"If a party seeks to raise error which occurred at trial, or afterward in a verdict

the motion to correct error arises under Trial Rule 59(G), which addresses matters outside the trial record, is it imperative that a party responding to a motion to correct error also file that motion.[289]

a. Grounds for relief.—The bases for this motion are found under section 59(A),[290] and the Rules Committee's Notes[291] show that no change was intended in the substantive law which has developed the various grounds for relief. The first paragraph of section 59(A) was rewritten to explain that the section now sets out the bases for this motion. The provision in the first paragraph of the former section 59(A) concerning who can file the motion, was moved to the current section 59(B).

b. Who may file.—Under section 59(B), the motion may be filed by any party or by the trial court. It should be observed that a significant question may arise when one seeks to intervene, particularly if that person seeks to intervene late in the litigation. A person who has not shared the burden and expense of the litigation, but wants to intervene to "set some new law," can force the other parties into the appellate process when they might not have wanted the additional burden and cost of an appeal. There is nothing in Trial Rule 59 which speaks to this question. However, these considerations should arise with a request for intervention or separation of causes for trial.

c. Statement in opposition.—Section 59(F)(1) introduces a new concept into the motion to correct error practice and procedure; this is the "statement in opposition."[292] The statement must be made not later than fifteen days after service of the motion to correct error.[293] The statement may assert grounds which show (a) that the final judgment or appealable final order should remain unchanged, or (b) that the party filing the motion to correct error should not receive the relief sought, or (c) that the party filing the statement is entitled to relief other than that sought by the opposing party in the motion to correct error.[294]

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or judgment, then [the previous rule] require[d] that party to make a motion to correct error." 268 Ind. at 306, 375 N.E.2d at 596.

[289]IND. R. TR. P. 59(G)(3).

[290]IND. R. TR. P. 59(A).

[291]COMMITTEE NOTE, *supra* note 88, *reprinted in* 1 1980 Ann. Ind. Code Serv. 361 (West), states:

> There is very little change effected from former T.R. 59(A). The first paragraph was rewritten to explain that this provision sets out the bases for the motion. What was found under the first paragraph in the former rule has been moved to the new provision, T.R. 59(B), where the parties and the trial court are empowered to make this motion.

[292]IND. R. TR. P. 59(F)(1), (2).

[293]IND. R. TR. P. 59(F)(1). IND. R. TR. P. 5 & 6 govern issues concerning the time, manner and effectiveness of service.

[294]IND. R. TR. P. 59(F)(1).

It is imperative to understand that the statement is *not* required as a jurisdictional prerequisite to an appeal, or to raising the above-mentioned points on appeal once a motion to correct error has been filed by an opposing party or the trial court.[295]

The statement serves multiple purposes. It gives the party opposing the motion time in which to reply, and it allows the party making the statement an opportunity to address the trial court concerning the issues raised by the movant. The statement may show that the final judgment or appealable final order should not be changed, perhaps avoiding an appeal which otherwise might be taken from the trial court's response to the motion to correct error.

In many instances, a party who has received a judgment might consider requesting additional relief on appeal. The burdens associated with an appeal, however, are often too great when balanced against the judgment received in the trial court and the uncertainty of additional relief. The statement in opposition is designed to remedy that situation by affording the party an opportunity to show why he is entitled to some form of relief other than that which was received.[296]

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[295]COMMITTEE NOTE, *supra* note 88, concerning Trial Rule 59(F)(1) explains the statement in opposition.

> Subsection (1) of T.R. 59(F) describes the situtation in which an appellee or a party who opposes a motion to correct error wants to present to the trial court certain grounds for sustaining the final judgment or appealable final order, which is under attack by a motion to correct error. In addition, that party might want to direct the trial court's attention to certain errors which were adverse to the party (who stands in opposition to the motion to correct error), which would be the bases for the relief which might be had, rather than the relief which the party who has made the motion to correct error has sought.
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> This is raised by the practical matter which can develop, under each section of T.R. 59(F), and *P-M Gas*, that a judgment may be sufficiently favorable to a party that the party will choose not to commence his own appeal on the basis of errors which occurred which were adverse to him. If the other side or party decides to commence an appeal, however, the prevailing party or the party who received the judgment might want to show the trial court and the appellate court why he should continue to prevail, or he might want to show that there were other grounds which would give the prevailing party other relief.
>
> It is to be emphasized that the filing of a statement in opposition to the motion to correct error is not a jurisdictional requirement for asserting those same or similar grounds in the appellate court by the party who prevailed when the motion to correct error was denied under subsection (2). Thus each subsection, working together, is designed to give maximum flexibility to the trial court and the parties, and to generate excellent appellate court practice.

Id. reprinted in 1 1980 Ann. Ind. Code Serv. 365 (West).

[296]*Id.*

Nonetheless, the party who would have filed the statement in opposition can raise precisely the same points on appeal even if no statement in opposition was filed in the trial court.[297] The statement is not mandatory and is not a prerequisite to raising those questions on appeal, even if they are first raised to the supreme court on a petition to transfer. This proposition is consistent with the meaning of section 59(F)(2). It is to be emphasized, though, that the statement in opposition may be filed in *every* case and situation in which a motion to correct error is filed. It is not limited to the situation set out in section 59(F)(2).

d. Motion to correct error denied—section 59(F)(2).—This section was borrowed from Federal Rule of Civil Procedure 50(d),[298] but its applicability is much more extensive. The federal rule is limited, generally speaking, to a motion for a judgment notwithstanding the verdict, whereas the Indiana provision is applicable to all relief which can be granted under Trial Rule 59, including all of the bases for relief set out in section 59(A) and all of the relief available under section 59(I), as supplemented by Appellate Rule 15(N).[299]

Thus an appellee is not limited under section 59(F)(2) to seeking only a new trial from an appellate court. Under the federal rule, a new trial is generally held to be the only alternative available to the appellee who might have his judgment upset on appeal. However, if the state court appellee believes that the appellant might be successful in reversing the trial court's judgment and obtaining a new judgment consistent with his motion to correct error, the appellee can request forms of relief other than merely a new trial. The appellee can make that request even if it was not made in the trial court.

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[297] *Id.*

[298] FED. R. CIV. P. 50(d) states in part:

> If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

[299] IND. R. APP. P. 15(N). The authority of the Indiana appellate court to grant relief other than what was asked for in the trial court was expressly affirmed in Cunningham v. Hiles, 402 N.E.2d 17 (Ind. Ct. App. 1980). The court cited Trial Rule 59(E), Appellate Rule 15 and prior Indiana decisions. The *Cunningham* decision goes beyond the language of Trial Rule 59(F)(2), in that the court of appeals stated, "It is well settled that the relief granted by this Court need not be identical to the relief requested by the parties. McConnell v. Thompson (1937), 213 Ind. 16, 11 N.E.2d 183." 402 N.E. 2d at 20 n.3.

The appellee's request for relief would be made in his brief,[300] and the request can be made even if the appellee did not make a motion to correct error in the trial court asserting the insufficiency of relief and the underlying trial error which supports the assertion. For example, an appellee could ask for increased damages in the appellate court even if the appellee did not make that request in the trial court or in a statement in opposition.

It is clear that this provision changes a part of *P-M Gas & Wash Co. v. Smith*,[301] and it changes the limitation-of-issues-on-appeal holdings in cases such as *DeHart v. Anderson*.[302] The Rules Committee comments affirmatively recognize this change concerning Trial Rule 59(E).[303] The principle is the same under either section 59(E) or section 59(F)(2).

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[300]The 1980 amendments to Appellate Rules 8.1 and 8.3, with their Committee Notes follow. *See* note 88 *supra* for explanation of typing code.

IND. R. APP. P. 8.1(A) states:

> Appeals from Final Judgments *or Appealable Final Orders.* The appellant shall have thirty (30) days after filing the record in which to file his brief, and if the brief is not filed within that time, the clerk shall enter an order dismissing the appeal, unless a petition for extension of time is on file. The appellee shall file his brief within thirty (30) days after the filing of the appellant's brief. ~~If cross errors are assigned, the appellee shall file his brief thereon within thirty (30) days after the filing of the appellant's brief or the same shall be stricken out.~~ The appellant shall file his reply brief within fifteen (15) days after the filing of appellee's brief.

COMMITTEE NOTE, *supra* note 88. The committee's comment states that the "amendments are necessitated by the proposed amendments to Trial Rule 59." *Id.*

IND. R. APP. P. 8.3(A) states in part:

> (A) Brief of the Appellant. . . .
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> . . . .
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> (7) An argument. Each error assigned in the motion to correct errors that appellant intends to raise on appeal shall be set forth specifically and followed by the argument applicable thereto. If substantially the same question is raised by two or more errors alleged in the motion to correct errors, they may be grouped and supported by one argument. *If an error is raised on brief which was not set out in the court below in a motion to correct errors, the error will be considered on appeal if raising the error is consistent with the provisions found in Trial Rule 59.* The argument shall contain the contentions of the appellant with respect to the issues presented, the reasons in support of the contentions along with citations to the authorities, statutes, and parts of the record relied upon, and a clear showing of how the issues and contentions in support thereof relate to the particular facts of the case under review.

COMMITTEE NOTE, *supra* note 88. The committee's comment again states that the "amendments are necessitated by the proposed amendments to Trial Rule 59." *Id.*

[301]268 Ind. 297, 375 N.E.2d 592 (1978).

[302]383 N.E.2d 431, 434 (Ind. Ct. App. 1978), *discussed in*, Harvey, *1979 Survey*, *supra* note 9, at 83 and the text accompanying note 207 therein.

[303]COMMITTEE NOTE, *supra* note 88, develops this important principle of Indiana appellate practice fully.

An appellant, however, is limited on appeal to the assertion of those bases and errors which were asserted in his motion to correct error, which the trial court denied. Thus the appellant must carefully

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(2) It is the intention of the Committee to change one of the holdings in *P-M Gas*, in this section. In *P-M Gas* the Court stated "[that] it is not necessary for that appellant to file a motion to correct error if appellant does not raise error himself. If appellant seeks [only to appeal the favorable relief given to appellee] because it was incorrect . . . then it is not necessary for the appellant to do more than request relief on brief in the appellate court." 375 N.E.2d at 597.

It is the Committee's judgment that *P-M Gas* has altered the traditional rule that a party must first specifically present error to the trial court for an opportunity for correction and only then can that party raise the error on appeal. That rule has been altered to the extent that an appealing party can raise error in the appellate court by appealing the trial court's ruling on a motion to correct error without making a motion to correct error too.

The Committee recommends that this principle be extended to the situation identified in the examples set out below.

The Committee recommends that this provision be interpreted to allow an appellant in this situation to appeal not only the granting of the motion to correct error, which would be raised on brief as set out in *P-M Gas*, but the appellant should be allowed to raise those errors which occurred at trial on brief in the appellate court too.

For example: X received a judgment as the plaintiff in an action against Y, but two rulings were made against X on the admissibility of evidence which caused X's evidence to be excluded. X properly preserved the questions at trial, by an offer to prove. Y made a motion to correct against X's judgment, and had a judgment entered for Y, the defendant, and now appellee, on that motion.

It is the Committee's recommendation that X be allowed to appeal the entry of the motion to correct error, and raise, in addition, the two claimed errors which adversely affected X at trial, without making a motion to correct error to that effect. In this way, that part of *P-M Gas* would be changed, and the limitation on issues on appeal found in *DeHart v. Anderson*, 383 N.E.2d 431, 433-434 (Ind. App. 1979) be changed too.

In such a situation as the one confronting X in this appeal, it might be the case that the appellate court, and X too, believes that X's original judgment cannot be reinstated. Nevertheless, X might be entitled to a new trial because of the alleged trial court error, and can show the appellate court that error and ask for that relief, in the alternative, in X's appeal to the appellate court.

The Committee believes that X should be able to make that appellate claim without filing a motion to correct error as a predicate for making it.

Of course, under this provision it will be necessary for the appellant to have objected to the ruling at trial which was adverse to the appellant. In that way the trial court has had an opportunity to examine the issue and rule; the Committee believes that is sufficient and that it need not recur in the trial court, and can be raised on brief by the appellant herein described.

To further demonstrate the intention of the Committee, the Committee considered but rejected the following language:

> If a party seeks relief on appeal from error which is claimed to have occurred prior to or in the trial court's entry of a judgment,

weigh the law found in this rule before taking an appeal. The appellee can ask for different relief on appeal than that received by the appellee in the trial court; but the appellant cannot do this. The distinction is entirely justified by the fact that a trial court (judge or jury) has made a decision upon the claims asserted there, and if an appellant is allowed to reassert his lost claims in a second (appellate) court, which is the essence of an appeal, then an appellee should also be allowed to seek relief which was not received in the trial court.

e. Motion to correct error granted—section 59(E).—This section is new, and the Rules Committee Note[304] explains that it speaks to several situations. It sustains one of the principal holdings of *P-M Gas*, the holding that only one motion to correct error is ever required.[305]

The fundamental trial court pattern which is addressed in section 59(E) is that the appellant received a judgment, which the ap-

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or an appealable final order, that party must have filed a motion to correct error directed to the error which is claimed.

The Committee preferred a more liberal system of raising errors on appeal, if it is the appellant who raises that error, and hence rejected the provision set out.

COMMITTEE NOTE, *supra* note 88, *reprinted in* 1 1980 Ann. Ind. Code Serv. 363-64 (West).

[304]The initial text of the Committee's comment on §59(E), which precedes the text in note 303, *supra*, states:

This section is new, and it speaks to several situations. A party under *P-M Gas* can appeal an adverse determination made on another party's motion to correct errors, without making a motion himself. See *P-M Gas v. Smith*, 375 N.E.2d at 597. That remains correct under this section.

In addition, any party is allowed to appeal a ruling on a motion to correct errors without making another motion, or a 'second' motion to correct errors, see *Bridge v. Board of Zoning Appeals of Ft. Wayne*, 381 N.E.2d 1060 (Ind. 1978). This provision is consistent with that holding, and rule.

(1) Under this provision, if the appellant received a judgment and the appellee made a motion to correct errors against that judgment, which the trial court granted, and entered judgment against the appellant (or a lesser form of relief), then the appellant can appeal the granting of the motion to correct errors without making a motion himself and the appellant can ask for the reinstatement of the judgment which was set aside in the trial court as a result of the motion to correct errors. That was the factual setting in *DeHart v. Anderson*, 383 N.E.2d 431, 433-434 (Ind. App. 1978), in which the Court of Appeals pointed out that the issues on appeal were determined by: (1) the judgment dismissing the cause (which occurred in the case), (2) the motion to correct errors, and (3) the trial court's ruling on the motion. The provision is also consistent with the procedural facts and law in *Schmal v. Ernst*, 387 N.E.2d 96 (Ind. App. 1979).

COMMITTEE NOTE, *supra* note 88, *reprinted in* 1 1980 Ann. Ind. Code Serv. 363 (West).

[305]268 Ind. at 303, 375 N.E.2d at 596. However, at least one party must make a timely motion to correct error. *See* Indiana Parole Board v. Gaidi, 395 N.E.2d 829 (Ind. Ct. App. 1979).

pellee upset in the trial court on the appellee's motion to correct error. The Rules Committee recommended[306] that the appellant should also be able to raise those errors which were raised in his opponent's motion to correct error and in the judgment which was upset. In addition, the appellant should be able to raise other errors concerning rulings adverse to him in the trial court, without first making a motion to correct error himself to raise those points. Thus, the ruling in cases such as *P-M Gas & Wash Co.* and *DeHart* are changed to allow the appellant to raise an error or question which was not asserted in an appellant's motion to correct error in the trial court because the appellant did not make such a motion.

Any party is allowed to appeal a ruling on a motion to correct error without making another motion, or a "second" motion, and that law is continued under this provision.

f. Errors which can be raised by motion—section 59(D)(1).—The motion to correct error must clearly address those errors which allegedly occurred prior to the entry of the final judgment or appealable final order. When this provision is read with section 59(C), it is also clear that if there is some error which developed in the sixty-day period for filing the motion to correct error, that error too can be addressed in the motion.

g. Content of the motion—section 59(D)(2).—This provision contains the essence of former Rule 59(B). The Advisory Committee stated, though, that "this rule does address *errors* and not *issues* which latter word was used throughout the former rule, and is discontinued in the new rule."[307]

h. Finality of judgment—section 59(C).—The Rules Committee Note[308] contains an excellent discussion on the law and doctrine of

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[306]*See* note 303 *supra*.

[307]The full text of the Committee's comments on IND. R. TR. P. 59(D)(2) states:

> This provision contains the essence of the rule and case law which was found in the former section in the old T.R. 59(B), and it is expanded somewhat here. No change in the case law interpretation was contemplated by the Committee in this reorganization, except it is to be emphasized that this rule does address *errors* and not *issues* which latter word was used throughout the former rule, and is discontinued in the new rule.

COMMITTEE NOTE, *supra* note 88, *reprinted in* 1 1980 Ann. Ind. Code Serv. 362-63 (West).

[308]The text of the Committee's comment relating to "finality" follows:

> This provision replaces former rules found under T.R. 59(C) and 59(G). The Committee does not intend to make the motion applicable to interlocutory orders, or orders appointing or refusing to appoint a receiver, or to orders in proceedings supplemental to execution. Thus the exceptions found in former T.R. 59(G) are saved and preserved, but they are not expressly set out in the rule itself. Additionally, no change in the former case law has been contemplated either, and those cases which addressed interlocutory orders, or

"finality" which has developed in Indiana, and two major points about that discussion are to be made. First, the motion to correct error is not applicable to interlocutory orders, or to orders appointing or refusing to appoint a receiver, or to orders in proceedings supplemental to execution. Prior law was not changed, although these exceptions are not expressly stated in the present rule; they were in the former rule. No change in the former law was made or intended in this regard. Second, the Rules Committee Notes treat certification of a class, in class action litigation under Trial Rule 23, as a final and appealable order, although previously most of those questions have been raised on appeal under Appellate Rule 4(B)(5),[309] rather than as of right. The Rules Committee's judgment was that the court in *Gulf Oil Corp. v. McManus*,[310] concluded that class certification would be a final order or judgment, and that the better procedure would be to treat certification questions as "final" for purposes of an appeal.

A major problem area, which often appears to be related to a question of "finality of judgment," occurs when a trial court, or an administrative function in the trial court system, is non-responsive to a motion to correct error or to another request made by motion to the trial court. In using the word "non-responsive," several situations come to mind. First, a trial court might fail to address the

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orders appointing or refusing to appoint a receiver, or orders in proceedings supplemental to execution in the context of T.R. 59 are saved.

The Committee has seen the essential problem here as one of "finality", although the Committee has not defined either "final judgment" or "appealable final order" as those words are used in this section. Final orders and judgments are defined, generally speaking, by case law or by rules. Thus a final judgment or order is one which finally determines the rights of the parties involved, and which the trial court intends as its final and complete disposition in the case.

In addition, T.R. 54(B) and 56(C), each define "finality" when those rules are complied with, as shown in the leading decision of *Stanray Corp. v. Horizon Constr., Inc.*, 342 N.E.2d 645 (Ind. App. 1976); compare *Geyer v. City of Logansport*, 317 N.E.2d 893 (Ind. App. 1974). An order under T.R. 23(C)(1), which allows an action to exist as a class action, is a final determination, and appealable under this provision, *Gulf Oil Corp. v. McManus*, 363 N.E.2d 223 (Ind. App. 1977), but a discovery order or an order effecting discovery, without a special certification under App. R. 4(B)(5), and which is not appealable as an interlocutory order under App. R. 4(B)(1)-(4), see *Finley*, [*sic*] *v. Finley*, 367 N.E.2d 1126 (Ind. App. 1977), is not a final order or judgment and not appealable as such. *Greyhound Lines v. Vanover*, 311 N.E.2d 632 (Ind. App. 1974).

COMMITTEE NOTE, *supra* note 88, *reprinted in* 1 1980 Ann. Ind. Code Serv. 361-62 (West).

[309] IND. R. APP. P. 4(B)(5).

[310] 363 N.E.2d 223 (Ind. Ct. App. 1977), *see* note 308 *supra*.

questions raised in the motion to correct error and simply re-enter the prior judgment or appealable final order. Second, a trial court might fail to address the questions raised in the motion to correct error but alter some other aspect of the final judgment or appealable final order in such a way that another error develops or alter the judgment in an insignificant way which does not speak to the errors raised in the motion. Third, a trial court might appear to have entered a final judgment or appealable final order, thus generating a motion to correct error, and after the motion is filed the court might make an entry under Trial Rule 54(B).[311] Last, in the category of the administrative function in the trial court, a clerk's office might fail to give notice, under Trial Rule 72,[312] of the entry of a ruling on a motion to correct error. This list is not exhaustive, but is sufficient to describe the problem area.

These situations are addressed in at least two cases, and the rule of those cases is preserved in the new Trial Rule 59. First, the Indiana Supreme Court, in *Soft Water Utilities, Inc. v. Le Fevre*,[313] held that a trial court has discretion to grant relief under Trial Rule 60 when a clerk of the trial court fails to perform an administrative function under Trial Rule 72 in sending late notice of a ruling, or in failing to send notice at all.[314] The case has been cited several times and the remedy which it supports should always be available to correct administrative errors made by the clerks of the courts.[315]

Other instances in which there is "non-responsiveness" to the motion to correct error may be remedied by the filing of a second motion to correct error which is permitted but not required under *P-M Gas*.

The leading case during this survey period is the court of appeals' decision in *Continental Casualty Co. v. Novy*.[316] There, the trial court was "non-responsive" to each party's motion to correct error in the sense that each was overruled and the relief sought was denied. However, the trial court entered "Amended Special Findings of Fact and Conclusions of Law and Judgment."[317] Afterward, the insurance company filed a second motion to correct error, as did the

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[311]The COMMITTEE NOTE quoted at note 308, *supra*, explains that IND. R. TR. P. 54(B) defines "finality."

[312]Under IND. R. TR. P. 72(D), the clerk has the duty, generally speaking, to give notice of rulings to the parties or their attorneys of record.

[313]261 Ind. 260, 301 N.E.2d 745 (1973).

[314]*Id.* at 269, 301 N.E.2d at 750.

[315]The same relief may be obtained from the appellate courts. Lugar v. State *ex rel.* Lee, 383 N.E.2d 287 (Ind. 1978); Costanzi v. Ryan, 368 N.E.2d 12 (Ind. Ct. App. 1977). *See* text accompanying note 350, *infra*.

[316]397 N.E.2d 294 (Ind. Ct. App. 1979).

[317]*Id.* at 295.

plaintiff Novy. Each of those motions was also overruled. Eventually, Novy filed a motion to dismiss the appeal for the reason that the insurance company's appeal was not timely with respect to the trial court's ruling on the first motion to correct error.[318] The appellate court was thus presented squarely with two questions: (1) whether a second motion to correct error could be filed and (2) whether an appeal taken from the trial court's ruling upon the motion was timely filed.[319]

The court of appeals held that a second motion to correct error was allowable and that the appeal was timely.[320] In so ruling, the court of appeals provided the needed flexibility which had not previously been stated in decisional form, but which had always been found in the trial rule.

The decision in *Novy* effectively addressed all of those areas which have been identified as "non-responsive" categories, and very probably all situations which may arise. The flexibility inherent in the decision is consistent with the proposition that the trial court should be allowed to correct its own mistake before an appeal ensues. The same spirit is found in the new Trial Rule 59 also, and its provisions hopefully will reduce the number of appeals because disputes can be resolved in the trial court even after an initial judgment is entered. The spirit is shown, for instance, in the permissive statement in opposition wherein the trial court can be presented with reasons to consider a different kind of relief than that which was entered. Seen in a broader context, the new Trial Rule 59, *P-M Gas* and *Novy* are responsive to the great demand for a better system of "dispute resolution" than was available in Indiana before the 1980 amendments.

i. Service of the motion on the trial judge—section 59(C).— There was no change from prior law in this very important provision. The rule states that the trial judge shall be served with a motion to correct error, and that filing must also be perfected according to Trial Rule 5.[321] This provision for service upon the judge is reptitious when Trial Rule 53.1[322] is examined, but is intentionally

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[318] *Id. See* IND. R. APP. P. 2(A).

[319] This writer would observe that in fact it should make no difference, in a jurisdictional sense, whether this kind of question is raised by a second motion to correct error, or by a motion under IND. R. TR. P. 60(B).

[320] 397 N.E.2d at 296.

[321] *See* IND. R. TR. P. 5(E).

[322] IND. R. TR. P. 53.1(A) requires that a copy of a motion to correct error "shall be served upon the judge before whom the cause is pending and proof of such service shall be filed with the court." The Committee's comments on this provision under IND. R. TR. P. 59(C) state:

> The provision concerning service of the Motion to Correct Error on the trial judge, has been placed here, and taken from former Trial Rule 53.1(A), in

so. The repetition is intended to alert or remind the attorney that Trial Rule 53.1 provides additional relief to the parties in the event of a delay in ruling on motions, and the trial judge must be served if the thirty-day limit in Trial Rule 53.1 is to be operative with respect to a motion to correct error. However, the basic effectiveness of a properly filed motion to correct error is not affected by a failure to effect service upon the trial judge.[323]

Under Trial Rule 59(C), the requirement that the motion to correct error shall be filed not later than sixty days after the entry of "a final judgment or appealable final order" is continued. Because of that language, counsel must remain particularly mindful of Trial Rule 54(B) and its provision for certification of a final judgment, and therefore, must file the motion to correct error in a timely manner after such a certification. It is still the rule that the motion, to be effective, must be filed against a final judgment or an appealable final order—as those terms are now used and defined in the new rule.

j. Affidavits and section 59(G).—The provision concerning a motion to correct error based on matters which appear outside the record is now contained in Trial Rule 59(G). The provision was rewritten and divided into four parts which relate to the service of affidavits and opposing affidavits by the moving party and the opposing party respectively.

The rule contemplates that no "reply" affidavits from the party first moving to correct error under this subsection shall be filed. The motion must be supported by affidavits under section 59(G)(1), and opposing affidavits may be filed under section 59(G)(2). Section 59(G)(4), however, provides that no additional affidavits need be filed by the movant under this aspect of the motion to correct error.[324]

Finally, it should be noted that section 59(G)(3) allows the filing of a separate motion to correct error by the party who opposes the first motion under this subsection. Thus, only when a party wishes to assert other errors based on evidence outside the record, are two motions to correct error recognized and required.

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order to better remind the attorney of the service requirements found in the rule. There are no changes in the law which attends this provision, or in the interpretation thereof. Cases such as *Unishops, Inc. v. May's Family Centers, Inc.*, 375 N.E.2d 1135 (Ind. App. 1978), are retained unless overturned by subsequent decisions.

COMMITTEE NOTE, *supra* note 88, *reprinted in* 1 1980 Ann. Ind. Code Serv. 362 (West).

[323]Unishops, Inc. v. May's Family Centers, Inc., 375 N.E.2d 1135 (Ind. Ct. App. 1978).

[324]*Cf. In re* Marriage of Myers, 387 N.E.2d 1360 (Ind. Ct. App. 1979) (unless matters in an affidavit are contradicted, those matters shall be accepted as true for the purpose of determining whether relief should be granted).

k. Costs—section 59(H).—The Rules Committee Note[325] shows that no change in the former law was intended, although the rule was rewritten for purposes of clarity. The trial court has great discretion under this section, and it should be read in conjunction with section 59(I)(6) because the trial court may impose costs on the party seeking the new trial as a condition for that relief.

2. Transcript of Proceedings and Marginal Notes; Assignment of Error and Trial Rule 59.—The case of *Kentucky-Indiana Municipal Power Association v. Public Service Co.*[326] contains several important holdings concerning administrative matters in the appellate courts.

An appeal was taken from a Public Service Commission ruling on certain matters, and during the appeal the Commission raised the proposition that the appeal should be dismissed because (1) an assignment of errors was filed separately from the transcript of the proceedings contravening Appellate Rule 7.2(A)(1),[327] (2) the transcript was filed without marginal notations required under Appellate Rule 7.2(A)(3),[328] and (3) the transcript contained certain pages without numbered lines also in contravention of Appellate Rule 7.2(A)(3).[329]

The court of appeals distinguished the prior Indiana authority in *Scott Paper Co. v. Public Service Commission*,[330] by limiting the case to its facts.[331] In *Scott Paper*, the court had dismissed an appeal because the appellant failed to file any assignment of errors as required under section 8-1-3-1.[332] The court also distinguished *Moore v. Spann*[333] which had dismissed an appeal because the appellants had failed to include in the transcript of proceedings a certified copy of the motion to correct error, by limiting that case to a motion-to-correct-error type of appeal from a trial court.[334]

The court noted that unlike the motion to correct error, an assignment of error is filed with the appellate court and that its in-

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[325]COMMITTEE NOTE, *supra* note 88, *reprinted in* 1 1980 Ann. Ind. Code Serv. 367 (West), concerning costs states: "This provision is a slightly rewritten version of former T.R. 59(F). The Committee does not contemplate any change in the former law, but it was the hope of the Committee that the language used in the new provision is more clear than the former provision of 59(F)."

[326]393 N.E.2d 776 (Ind. Ct. App. 1979).

[327]IND. R. APP. P. 7.2(A)(1).

[328]IND. R. APP. P. 7.2(A)(3).

[329]*Id.*

[330]164 Ind. App. 565, 330 N.E.2d 137 (1975).

[331]393 N.E.2d at 783.

[332]IND. CODE § 8-1-3-1 (1976).

[333]157 Ind. App. 33, 298 N.E.2d 490, *rehearing denied*, 302 N.E.2d 825 (1973).

[334]393 N.E.2d at 783.

clusion is a matter of convenience to the court, and perhaps to the parties also; thus, it is a rule of waiver, not a rule of jurisdiction.[335] The court held that the rules[336] requiring marginal notations on pages of the transcript, pagination, and references in the brief to page and line information are rules for the benefit of the court, not the parties.[337] The court has the discretion to invoke the rule and might order a rebriefing or correction of the defect, but the court may also deem the question waived.[338]

The practitioner should note that the discretion found in the court's authority to waive these certain mechanical defects was not extended to a failure to include a motion to correct error when appeal is taken from a trial court's final judgment.[339]

3. Petition for Rehearing.—In *Ross v. Schubert*,[340] the appellee filed a petition for rehearing after the court of appeals reversed[341] a jury verdict and judgment in his favor. The appellant filed a motion to dismiss the petition because it contained extensive argument improperly interspersed within the petition. The appellee had failed to separate his argument into a supporting brief. The court of appeals granted the motion to dismiss, citing the language in Appellate Rule 11(A),[342] and various cases decided under that rule's predecessor.[343]

4. Failure to File Timely Brief.—In *Metropolitan Development Commission v. Douglas*,[344] the plaintiff brought suit against Douglas seeking a permanent injunction because Douglas' carport was allegedly constructed in violation of a certain Marion County zoning ordinance. The trial court denied the injunctive relief, and the plaintiff appealed.

In the appeal, the defendant did not file an appellee's brief, and the court of appeals noted that, in such a case, the appellant "need

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[335]*Id.* at 784.

[336]IND. R. APP. P. 7.2(A)(3), 8.2(B)(5).

[337]393 N.E.2d at 784.

[338]*Id.* In Stewart v. State, 402 N.E.2d 973, 974 (Ind. 1980), the supreme court stated, "It is well settled that an appellate court possesses the inherent power to award *sua sponte* a writ of certiorari in order to complete or correct the record on appeal."

[339]393 N.E.2d at 783.

[340]396 N.E.2d 147 (Ind. Ct. App. 1979).

[341]388 N.E.2d 623 (Ind. Ct. App. 1979).

[342]IND. R. APP. P. 11(A) provides in part: "Application for a rehearing . . . may be made by petition, *separate from the brief*, . . . stating concisely the reasons why the decision is thought to be erroneous. Such application may, if desired, be supported by briefs . . . ." (emphasis added).

[343]*E.g.*, Automobile Underwriters, Inc. v. Smith, 241 Ind. 302, 171 N.E.2d 823 (1961).

[344]390 N.E.2d 663 (Ind. Ct. App. 1979).

only establish that the trial court committed prima facie error to [obtain a] reversal."[345]

5. Timely Filing a Motion to Correct Error.—In *White v. Livengood*,[346] the plaintiff had obtained a judgment for $6,000 for certain items of personal property. The defendant obtained the services of an attorney fifty-eight days after that judgment. The attorney immediately filed a defective motion to correct error[347] and requested permission to file a belated motion to correct error. The second motion to correct error was filed about ninety days after the judgment against the defendant.

The court held that the second motion was not timely,[348] because the limitations found in Trial Rule 6(B)(2)[349] specifically state that the time for filing a motion to correct error cannot be extended. The effect of allowing the second motion would have been to extend the time for filing it. The court did state, however, that it "ha[d] the inherent power to entertain an appeal although jurisdictional time limits have expired,"[350] but that such discretion would be exercised "only in rare and exceptional cases, such as in matters of great public interest, or where extraordinary circumstances exist."[351]

6. Trial Rule 59 and New Trial Limited to Damages.—In *Amos v. Keplinger*,[352] the court of appeals held, in an interpretation of Trial Rule 59(I)(5),[353] that, regardless of the rule's language, a trial court does not have the authority "to assess credibility or weigh conflicting evidence on the issue of damages."[354] Rather, under Trial Rule 59(I)(5), the trial court is authorized "to enter a final judgment fixing damages when the evidence on the amount of damages is

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[345]*Id.* at 664 n.2.

[346]390 N.E.2d 696 (Ind. Ct. App. 1979).

[347]The motion was defective because it failed to allege any error with the required specificity. *See* IND. R. TR. P. 59(D)(2).

[348]390 N.E.2d at 698.

[349]IND. R. TR. P. 6(B)(2).

[350]390 N.E.2d at 699 (citing Lugar v. State *ex rel.* Lee, 383 N.E.2d 287 (Ind. 1978); Costanzi v. Ryan, 368 N.E.2d 12 (Ind. Ct. App. 1977)).

[351]390 N.E.2d at 699 (quoting Costanzi v. Ryan, 368 N.E.2d 12, 16 (Ind. Ct. App. 1977)). An example of the latter would occur when the clerk gave incorrect notice of the date of the ruling on the motion to correct error. *See* Soft Water Utils., Inc. v. LeFevre, 261 Ind. 260, 301 N.E.2d 745 (1973) (late filing of a praecipe); Goodwill v. Goodwill, 382 N.E.2d 720 (Ind. Ct. App. 1978) (late filing of a transcript).

[352]397 N.E.2d 1010 (Ind. Ct. App. 1979).

[353]IND. R. TR. P. 59(I)(5). The court in *Amos* construed former Trial Rule 59(E)(5). After the 1980 amendments, that provision is now embraced in Trial Rule 59(I)(5), which states that a trial court, as a part of the relief to be granted on a motion to correct error, can: "In the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages, grant a new trial, or grant a new trial subject to additur or remittitur."

[354]397 N.E.2d at 1011.

clear and unrebutted."[355] Because the evidence in *Amos* on damages was conflicting, the trial court's award of damages, in the amount of $4,915.36, was reversed for a new trial solely on the issue of damages.[356]

In *McNall v. Farmers Insurance Group*,[357] the plaintiff brought suit under his father's uninsured motorist policy, for injuries sustained in a motorcycle accident. The plaintiff's appeal concerned the jury's failure to award damages in spite of a verdict in his favor. The court of appeals stated that "[w]here the trier of fact has found [for] the plaintiff on the issue of liability and the evidence relating to injury is uncontroverted and establishes a substantial injury proximately caused by the defendant's negligence, an assessment of damages inconsistent with the uncontroverted evidence is improper and will be reversed."[358]

The court noted that a new trial could be limited to the question of damages alone, but held that in this case it would not be appropriate.[359] It appeared that the jury's verdict was a result of compromise on the questions of liability and damages. As a result, the new trial would extend to both damages and liability, pursuant to Appellate Rule 15(N).[360]

In *Hudson v. Dave McIntire Chevrolet, Inc.*,[361] the plaintiff bought a car, paying the full purchase price of $2944, but returned it due to uncorrected mechanical defects. Suit was filed for the purchase price plus incidental and consequential damages. The trial court found for the plaintiff but awarded him only $177.78 as total damages. The appellee admitted on appellate brief that the trial court was in error, but asked for relitigation of the liability question. In the trial court, the appellant made a motion to correct error limited to damages only.

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[355] *Id.*

[356] *Id.*

[357] 392 N.E.2d 520 (Ind. Ct. App. 1979). *See also* Dayton Walther Corp. v. Caldwell, 389 N.E.2d 723, *opinion clarified and rehearing denied*, 393 N.E.2d 723 (Ind. Ct. App. 1979), *vacated in part*, 402 N.E.2d 1252 (Ind. 1980). The court of appeals had ordered a new trial under IND. R. APP. P. 15(N)(5) limited to the issue of damages only. 393 N.E.2d at 211. The supreme court vacated the court of appeals' decision in part, 402 N.E.2d at 1253, and held that the evidence was sufficient to sustain the jury's verdict of about $800,000 and that trial counsel's comments on the evidence were fully supported in the record. *Id.* at 1259. The supreme court's decision to vacate the court of appeals' decisions did not upset the lower appellate court's interpretation of IND. R. APP. P. 15(N). 402 N.E.2d at 1253.

[358] 392 N.E.2d at 525.

[359] *Id.* at 526.

[360] *Id.* at 525. "[I]f a new trial is required it shall be limited only to those parties and issues affected by the error unless such relief is shown to be impracticable or unfair." IND. R. APP. P. 15(N). Identical language is contained in IND. R. TR. P. 59(I).

[361] 390 N.E.2d 179 (Ind. Ct. App. 1979).

The court of appeals observed that Indiana decisions did not articulate a "specific standard by which the propriety of granting a new trial limited to damages . . . is to be judged."[362] The decisions of other jurisdictions were reviewed, and the court concluded that a showing of inadequate damages, which was admitted by all parties here, did not automatically entitle an appellant to a new trial on damages alone.[363] Rather, the appellant must also carry the burden of showing that the liability issue is clear and free from doubt, which this appellant did not do.[364] The case was reversed for a new trial on all issues.[365]

On the question of damages, the court noted that "consequential damages are recoverable when they represent a loss 'resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know'" and that such questions are for the trier of fact to determine.[366] The court further observed that the buyer could present evidence that the seller had reason to know that the buyer would borrow money to complete the purchase, and consequential damages consisting of interest on that bank loan could be shown and proved.[367]

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[362] *Id.* at 182.
[363] *Id.*
[364] *Id.* at 183-84.
[365] *Id.* at 184.
[366] *Id.* at 184 n.4.
[367] *Id.*

APPENDIX

INDIANA JUDICIAL REPORT FOR 1979

The following information is taken from pages 31, 32, 35 and 36.

The trial court caseload data reflected herein was reported by the trial courts on a standard form (Quarterly Case Status Report) on a quarterly basis. These reports contain information on the cases filed (including those that come on a change of venue), disposed and pending at the end of the reporting period. This information is categorized by type of case, such as criminal, civil, dissolution, etc. The reports also show the method of disposition for the type of cases. Other matters, such as number of days with Judges Pro Tempore, number of trials disposed by Special Judges, number of cases heard or disposed by Masters, the use of Court Commissioner or Referee, and the number of days the Judge served in another County are also reported but are not reflected in this report. The information submitted on a quarterly basis has been combined and is presented here as yearly totals.

The reports are divided into two sets, Caseload of the Circuit and Superior Courts (including the Marion County Municipal, Juvenile, Probate and Criminal Courts, and the St. Joseph Probate Court) and Caseload of the County Courts. The latter set includes the cases filed in the small claims and misdemeanor dockets of the Circuit and Superior Courts, where such dockets exist. This caseload is referred to as "County Court Function" of the Circuit and Superior Courts.

As used in this report, the following definitions apply:

Criminal: This includes both misdemeanors and felony cases. Where multi-defendants are jointly charged and tried, only one criminal case is noted.

Re-Docketed Criminal: This includes those criminal matters which are re-opened after an initial judgment is entered. An example of this type of case would be a proceeding under Post Conviction Remedy Rule 1.

Juvenile: This includes all juvenile matters where formal proceedings are initiated and such proceedings concern a minor.

Civil: This includes all civil cases other than dissolution, probate, adoption, or guardianship cases. In the County Courts and the "County Court Function" of the Circuit and Superior Courts, small claims are reported separately.

Re-Docketed Civil: Those civil matters which for some

reason are again brought before the court following the entry of the initial judgment.

Dissolution: Cases where the parties seek to dissolve a marriage.

Re-Docketed Dissolution: Dissolution cases where the cause is brought before the court after the initial judgment. This would include petitions to modify and contempt citations.

Probate-Adoption: Those proceedings involving the distribution of estates or adoption of children. This would not include claims against an estate which are litigated; such matters are shown as "civil" cases.

Non-Felony Traffic: Cases where a traffic citation was issued.

Guardianship: This involves such matters as where a guardianship is opened under existing law of the state.

Others: This category is intended to include matters where an adjudication is made, but the full formalities of a trial are not involved. This would include probable cause determinations and committment proceedings.

TOTAL CASES DISPOSED IN 1979

SUMMARY

	Circuit, Superior, Probate Courts	Marion Municipal Courts	County Courts & County Court Function	Total
Criminal	16,331	34,569	53,618	104,518
Re-Docketed Criminal	2,164	8	1,374	3,546
Juvenile	22,329	—0—	—0—	22,829
Civil (Plenary)	53,634	12,435	3,414	69,483
(Small Claims)	—0—	—0—	95,388	95,388
Re-Docketed Civil	13,836	7,355	28,689	49,880
Dissolution	50,854	—0—	—0—	50,854
Re-Docketed Dissolution	26,969	—0—	—0—	26,969
Probate/Adoption	20,644	—0—	—0—	20,644
Non-Felony Traffic	—0—	90,214	264,517	354,731
Guardianship	4,508	—0—	—0—	4,508
Other	11,263	—0—	5,251	16,514
*TOTAL	222,532	144,581	452,251	819,364

*This includes Venued Out cases.

SUMMARY

	Circuit, Superior, Probate Courts	Marion Municipal Courts	County Courts & County Court Function	Total
Jury Trial				
Criminal	932	69	180	1,181
Civil (Plenary)	754	54	23	831
(Small Claims)	—0—	—0—	—0—	—0—
Other	130	15	114	259
Bench Trials				
Criminal	1,404	6,932	6,761	15,097
Civil (Plenary)	11,841	832	1,503	14,176
(Small Claims)	—0—	—0—	18,777	18,777
Re-Docketed Civil	5,352	4,556	14,039	23,947
Dissolution	31,586	—0—	—0—	31,586
Non-Felony Traffic	—0—	7,391	9,319	16,710
Other	56,360	93	3,650	60,103
Settled	13,073	1,995	19,386	34,454
Plea	11,562	48,083	111,085	170,730
Dismissed	56,174	40,613	60,510	157,297
Default	18,449	6,668	39,108	64,225
Traffic Violations Bureau	—0—	23,946	152,354	176,300
Transferred Out	1,403	12	2,258	3,673
Venued Out	5,360	56	485	5,901
Closed	7,668	—0—	—0—	7,668
Other	484	3,266	3,181	6,931
Failed to Appear	—0—	—0—	9,518	9,518
TOTAL	222,532	144,581	452,251	819,364

V. Constitutional Law

STEPHEN E. ARTHUR*
CHRISTOPHER D. SEIGEL**

A. Introduction

During this survey period, several Indiana statutes have come under close judicial scrutiny as litigants have continued in their efforts to persuade the courts to expand the principles of equal protection, due process and first amendment freedoms. The courts have generally attempted to honor legislative discretion and have upheld the validity of these statutes whenever possible. This Article will focus upon the application of the above-mentioned principles by the Indiana and Seventh Circuit Courts. These decisions will further be analyzed in light of current United States Supreme Court case law and relevant interpretations from other federal and state jurisdictions.

B. State Decisions

1. Indiana Obscenity Statute.—The Indiana Court of Appeals rejected a constitutional attack on the Indiana obscenity statute.[1] In *Ford v. State*,[2] the appellant was convicted of distributing an obscene magazine.[3] Appellant challenged the statute as being vague and overly broad.[4] The basis of the argument was that terms such as

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[1]IND. CODE § 35-30-10.1-1 to -8 (1976 & Supp. 1980). During this survey period, the obscenity statute has been upheld on two other occasions. *See* Hogwood v. State, 395 N.E.2d 315 (Ind. Ct. App. 1979); Riley v. State, 389 N.E.2d 367 (Ind. Ct. App. 1979).

[2]394 N.E.2d 250 (Ind. Ct. App. 1979).

[3]The magazine depicted men and women performing sexual acts. *Id.* at 252.

[4]Appellant raised two other constitutional issues which were summarily rejected by the court of appeals. First, appellant averred that all sexual expression is protected under the first amendment. The court held obscenity is not protected speech or press under the first amendment. *Id.* at 253 (citing Kaplan v. California, 413 U.S. 115 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973)). In rejecting appellant's argument that the prohibition against providing sex material to consenting adults is an invasion of the right of privacy, the court cited *Paris Adult Theatre I* in which it was held that commercial sale of obscene material can be regulated even when distributed to consenting adults. 394 N.E.2d at 254. Finally, the court of appeals rejected appellant's argument that Stanley v. Georgia, 394 U.S. 557 (1969), wherein the United States Supreme Court recognized a constitutional right to possess obscene material in the privacy of the home, should be extended to

"patently offensive," "prurient interest in sex," "community standard" and "literary, artistic, political, or scientific value," do not import the same meaning to all individuals and therefore fail to provide advance notice of what material will be considered obscene.

The court of appeals reiterated the general principle that a criminal statute is vague and constitutionally defective when it fails to inform a person of ordinary intelligence of the conduct that is proscribed.[5] It set forth the present obscenity test which was established by the United States Supreme Court in *Miller v. California*.[6] The criteria for determining what constitutes obscene material are:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[7]

The court concluded that because the Indiana obscenity statute is written in a form prescribed by *Miller*, there was no first amendment infirmity.[8] It also rejected the appellant's vagueness argument

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protect the commercial sale of obscene material to consenting adults. The court cited United States v. Orito, 413 U.S. 139 (1973), which specifically rejected this argument. 394 N.E.2d at 255.

[5]394 N.E.2d at 253. *See* Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Constr. Co., 269 U.S. 385 (1926).

[6]413 U.S. 15 (1973).

[7]394 N.E.2d at 253 (quoting Miller v. California, 413 U.S. 15, 24-25 (1973)) (citations omitted). *See* Leventhal, *An Empirical Inquiry into the Effects of* Miller v. California *on the Control of Obscenity*, 52 N.Y.U.L. REV. 810 (1977).

[8]394 N.E.2d at 253. IND. CODE § 35-30-10.1-1 (Supp. 1980) sets forth the standards and definitions to be used in resolving the obscenity issue. Section one states:

> (a) "Matter" means (i) any book, magazine, newspaper, or other printed or written material; (ii) any picture, drawing, photograph, motion picture, or other pictorial representation; (iii) any statue or other figure; (iv) any recording, transcription, or mechanical, chemical, or electrical reproduction; or (v) any other articles, equipment, machines, or materials.
>
> (b) "Performance" means any play, motion picture, dance, or other exhibition or presentation, whether pictured, animated, or live, performed before an audience of one (1) or more persons.
>
> (c) A matter or performance is "obscene" if:
>
> (1) the average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;
>
> (2) the matter or performance depicts or describes, in a patently offensive way, sexual conduct; and

citing the language of *Roth v. United States*,[9] wherein the United States Supreme Court stated:

> Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ". . . [T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . ." These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark ". . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . . ."[10]

The court of appeals then concluded that the legal definition of obscenity does not change with each indictment and therefore provides sufficient notice of proscribed conduct under the obscenity statute.[11]

The majority opinion met with a strong dissent by Presiding Judge Garrard.[12] Although acknowledging that the Indiana statute adopted the correct standard of obscenity as embodied in *Miller*,[13] he

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(3) the matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(d) "Sexual conduct" means (i) sexual intercourse or deviate sexual conduct; (ii) exhibition of the uncovered genitals in the context of masturbation or other sexual activity; (iii) exhibition of the uncovered genitals of a person under sixteen (16) years of age; (iv) sado-masochistic abuse; or (v) sexual intercourse or deviate sexual conduct with an animal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

(g) "Distribute" means to transfer possession for a consideration.

(i) "Owner" means any person who owns or has legal right to possession of any matter.

Paragraphs (f) and (h) were deleted by a 1978 amendment.

[9]394 N.E.2d at 253-54 (citing Roth v. United States, 354 U.S. 476 (1957)).

[10]354 U.S. 476, 491 (1957) (citations omitted).

[11]394 N.E.2d at 254.

[12]*Id.* at 256 (Garrard, P.J., dissenting).

[13]*Id.* at 257. The dissent states:

> However, despite numerous efforts, precision in the yardstick of definition has eluded us. Our courts have recognized that while "obscenity" is limited to representations or descriptions of certain forms of sexual conduct, the conclusion that a particular piece of material is obscene varies in the context in which the sexual expression appears and may also vary with the time and place in which it is considered.

Id.

disagreed that an average person reading the statute could determine in advance whether the material was in fact obscene.[14] Furthermore, he asserted that the real effect of the statute was to create a community of twelve jurors[15] whose determination would be largely insulated from standards of appellate review.[16]

The dissent points to an inherent weakness of the *Miller* standard. An individual is placed in the untenable position of speculating in advance whether twelve unknown members of his local community will judge his material obscene under the three-pronged standard of *Miller* and the Indiana statute. What criteria does this individual use in judging the local attitudes of his community on the issue of obscenity? Does he look at prior appellate case law which has dealt with the obscenity issue? If these cases involve similar facts to his own but arise in a different locality or section of the state, can he assume with any assurance that his local community will give similar facts a similar interpretation? Would it suffice for him to poll his community or seek a decision from the local governing body to determine what they believe are the community standards on obscenity? If these sources tell him that the material is not obscene, can he confidently rely upon their determination; or, is the individual still faced with the possibility of being judged by twelve jurors who are in the minority of that community and who believe the material to be obscene under the definition of *Miller*? The dilemma posed by the *Miller* standard prompted Mr. Justice Brennan to dissent in *Paris Adult Theatre I v. Slaton*[17] and to state:

> But after 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on

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[14] *Id.* at 258. In respect to the first prong of the *Miller* standard as adopted in IND. CODE § 35-30-10.1-1(c)(1), the dissent states:

> Were I to examine that definition to gauge my activity as a bookseller, there are questions I should like to ask: What community? Who or what establishes a standard for the community? Can material appeal to prurient interest of an *average* person, or is such appeal strictly subjective? When is the interest in sex prurient? How does one determine that prurient interest in sex is the dominant theme or merely a subsidiary aspect?

394 N.E.2d at 257.

[15] *Id.* at 258. The dissent argues that the term "local" community be judicially construed to mean a community of the entire state (citing for support IND. CONST. art. 4, § 22 and IND. CODE § 35-30-10.1-8 (Supp. 1980). 394 N.E.2d at 257 n.2.

[16] 394 N.E.2d at 258.

[17] 413 U.S. 49 (1973).

> the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we "know it when [we] see it," we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.[18]

Brennan's dissenting opinion concluded that because of the difficulty in determining in advance what conduct is proscribed and what material is obscene, "no person, not even the most learned judge much less a layman, is capable of knowing in advance . . . whether certain material comes within the area of 'obscenity' . . . ."[19]

2. Indiana Public Indecency Statute.—In *State v. Baysinger*,[20] the Indiana Supreme Court rejected several lower court rulings[21] that Indiana's public indecency statute was unconstitutionally vague and overbroad.[22]

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[18]*Id.* at 84 (Brennan, J., dissenting) (citation omitted).

[19]*Id.* at 87. The dissent further states:

> In this context, even the most painstaking efforts to determine in advance whether certain sexually oriented expression is obscene must inevitably prove unavailing. For the insufficiency of the notice compels persons to guess not only whether their conduct is covered by a criminal statute, but also whether their conduct falls within the constitutionally permissible reach of the statute. The resulting level of uncertainty is utterly intolerable, not alone because it makes "[b]ookselling . . . a hazardous profession," . . . but as well because it invites arbitrary and erratic enforcement of the law.

Id. at 87-88 (citations omitted).

[20]397 N.E.2d 580 (Ind. 1979).

[21]Three appeals were consolidated pursuant to IND. R. APP. P. 5(B). The nature of the individual actions is discussed by the majority opinion. 397 N.E.2d at 581.

[22]397 N.E.2d at 582. IND. CODE § 35-45-4-1 (Supp. 1980) provides:

> (a) A person who knowingly or intentionally, in a public place:
> (1) engages in sexual intercourse;
> (2) engages in deviate sexual conduct;
> (3) appears in a state of nudity; or
> (4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

The court cited Sidle v. Majors, 264 Ind. 206, 341 N.E.2d 763 (1976) for the standard of

First, the court considered appellee's argument that the statute was unduly vague because it failed to give adequate notice as to what areas are included within the term "public place."[23] The supreme court cited the language of *Peachey v. Boswell*[24] which defined the phrase "[i]n any place accessible to the public" with reference to a gambling ordinance:

> From a consideration of the terms "accessible," "public," and "public place," as defined hereinabove, together with the purpose of the Act, we have concluded that the phrase "in any place accessible to the public" as used in §10-2330, supra, means *any place where the public is invited and are free to go upon special or implied invitation—a place available to all or a certain segment of the public.*[25]

The supreme court concluded that prior case law has sufficiently defined the term "public place" as to provide fair notice of its meaning as required by due process of law.[26]

The court next considered appellee's argument that the statute sweeps broadly into the area of protected expression under the first amendment because it prohibits all "public nudity."[27] The appellee also argued that the term "public place" includes restrooms, showers, saunas, and locker rooms wherein individuals may have a right to be publicly nude.[28]

Appellee cited *Doran v. Salem Inn, Inc.*,[29] wherein the United States Supreme Court struck down a local ordinance which made it unlawful for bar owners and others to permit waitresses, barmaids, and entertainers to appear in establishments with breasts uncovered or so thinly draped as to appear uncovered. The Court determined that the defendant, who had provided topless dancing as entertainment, had standing to challenge the overbreadth of the or-

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review when a statute is challenged. The court in *Sidle* stated:

> [W]e recognize that the Legislature is vested with a wide latitude of discretion in determining public policy. Therefore, every statute stands before us clothed with the presumption of constitutionality, and such presumption continues until clearly overcome by a showing to the contrary.
>
> In the deliberative process, the burden is upon the challenger to overcome such presumption, and all doubts are resolved against his charge.

Id. at 209, 341 N.E.2d at 766.

[23]397 N.E.2d at 582.

[24]240 Ind. 604, 167 N.E.2d 48 (1960).

[25]*Id.* at 622, 167 N.E.2d at 56-57 (emphasis added).

[26]397 N.E.2d at 583.

[27]*Id.*

[28]*Id.*

[29]422 U.S. 922 (1975).

dinance.[30] Moreover, it concluded that the ordinance in question prohibited all conduct in the form of topless dancing and was therefore overbroad since it prohibited topless dancing not only in bars but in "any public place."[31] The Court stated:

> The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in "any public place" with uncovered breasts. There is no limit to the interpretation of the term "any public place." It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the "Ballet Africains" and a number of other works of unquestionable artistic and socially redeeming significance.[32]

Because the Court determined that there was no limit to the interpretation of "any public place" it had held the ordinance to be overbroad.[33]

The Indiana Supreme Court cited the language of the United States Supreme Court in *Broadrick v. Oklahoma*,[34] that "where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[35] The Indiana Supreme Court concluded that indecent public conduct is not protected speech or expression under the first amendment.[36] Moreover, it determined that there is no right to appear publicly in the nude but found that public nudity will be tolerated when related

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[30]*Id.* at 932-34 (citing Grayned v. City of Rockford, 408 U.S. 104 (1972)). *Cf.* California v. LaRue, 409 U.S. 109 (1972) (wherein the power of the state to regulate conduct through its authority to regulate the sale of alcohol was upheld). That Court in *LaRue* stated:

> But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of "conduct" or "action."

Id. at 117. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

[31]422 U.S. at 933.

[32]*Id.* (citing Salem Inn, Inc. v. Frank, 364 F. Supp. 478, 483 (E.D.N.Y. 1973), *aff'd*, 501 F.2d 18 (2nd Cir. 1974), *aff'd in part*, 422 U.S. 922 (1975)).

[33]422 U.S. at 934.

[34]413 U.S. 601 (1973).

[35]*Id.* at 615.

[36]397 N.E.2d at 587.

to a protected communication of ideas or expression under the first amendment.[37] The court emphasized that nude dancing in bars, under the facts of this case, involved only conduct and not protected expression under the first amendment.[38] In fact, the court noted that appellee had alleged as his primary injury only a reduction in income from the sale of liquor when no nude dancing was provided.[39] The court reasoned that this was not the import of the first amendment protections.[40]

The court concluded that the statute was not substantially overbroad as contemplated by *Broadrick* because: (1) Appellee's claim was not one under the first amendment since no protected expression was involved, (2) case law has restricted and defined conduct which can be prosecuted under the public indecency statute, and (3) Indiana's obscenity statute provides procedures and standards to be used when obscenity becomes an issue.[41] Therefore, the statute was held to be constitutionally sound.

The majority opinion met with a vigorous dissent from Justice DeBruler[42] who stated that the statute was "so grossly overbroad that no court could construe it so as to render it free from this constitutional defect as to do so would require the court to exercise a legislative authority, a role we [the court] cannot assume."[43] The dissent noted that the statute is indifferent to the manner in which public nudity arises[44] and mentioned several activities which are protected under the first amendment but which arguably come within the ambit of the statute.[45] The areas mentioned were: (1) Nude dancing or acting in a professional stage production,[46] (2) engaging in a public meeting to educate on breast-feeding or breast cancer self-examinations,[47] and (3) posing nude for art classes at state universities.[48] The dissent concluded that because the statute sweeps into these areas of protected conduct and expression, it is unconstitutional.[49]

3. Indiana Death Penalty Statute.—In *State v. McCormick*,[50]

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[37]*Id.*
[38]*Id.*
[39]*Id.*
[40]*Id.*
[41]*Id.*
[42]*Id.* (DeBruler, J., dissenting).
[43]*Id.* at 588. *See* Grody v. State, 257 Ind. 651, 278 N.E.2d 280 (1972).
[44]397 N.E.2d at 588 (DeBruler, J., dissenting).
[45]*Id.*
[46]*Id.*
[47]*Id.*
[48]*Id.*
[49]*Id.*
[50]397 N.E.2d 276 (Ind. 1979).

the Indiana Supreme Court affirmed a lower court ruling that section 35-50-2-9(b)(8) of the Indiana Code was unconstitutional as applied to the defendant. The defendant had been charged with a two count information. The first count of the information alleged murder and the second count alleged as an aggravating circumstance that the defendant had committed another unrelated murder for which he was under indictment in a separate criminal proceeding.

Indiana's death penalty statute provides a procedure which must be followed before the death penalty can be imposed.[51] Under this plan, the government must prove beyond a reasonable doubt both the principal charge and the aggravating circumstance.[52] The aggravating circumstance is proven at a sentencing hearing which is bifurcated from the trial on the principal charge.[53] If the principal charge is tried by jury, the sentencing hearing must likewise be conducted before the jury.[54] After the jury makes its recommendation on whether to impose the death penalty, the trial court makes a final and independent determination of sentence.[55] However, the trial court is not bound by the jury's recommendation.[56] During the sentencing hearing, the defense has a right to counter any aggravating circumstances demonstrated by the prosecution with evidence of mitigation,[57] to include the defendant's character, prior

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[51]IND. CODE § 35-50-2-9 (Supp. 1980).

[52]*Id.* § 35-50-2-9(a).

[53]*Id.* § 35-50-2-9(d).

[54]*Id.*

[55]*Id.* § 35-50-2-9(e).

[56]*Id.*

[57]*Id.* § 35-50-2-9(b) provides that the prosecution must prove beyond a reasonable doubt at least one of the following aggravating circumstances:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

IND. CODE § 35-50-2-9(c) (Supp. 1980) provides mitigating circumstances which may be considered:

record, the circumstances surrounding the aggravating circumstance or other reasons why the death penalty should not be imposed.[58]

The Indiana Supreme Court determined that proof of "another murder" as an aggravating circumstance under section 35-50-2-9(b)(8) of the Indiana Code would result in a full trial on the existence of the other murder.[59] The burden of proving this murder would be proof beyond a reasonable doubt by the same jury.[60] The court noted that under the facts of the *McCormick* case, any evidence relating to the principal murder would have been inadmissible in proving the aggravating murder.[61] However, since the jury would have already heard the evidence on the principal charge, they would be unduly prejudiced in their ability to evaluate the evidence on the murder alleged as an aggravating circumstance.[62] The court reasoned that because of this potential bias, the jury might be inclined to find the defendant guilty of the aggravating murder on a level of proof less than that of proof beyond a reasonable doubt.[63] Therefore, due to the inherent risk of prejudice to the defendant, the court held that section 35-50-2-9(b)(8) was unconstitutional as therein applied.[64] The

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(1) The defendant has no significant history of prior criminal conduct.
(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.
(3) The victim was a participant in, or consented to, the defendant's conduct.
(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.
(5) The defendant acted under the substantial domination of another person.
(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.
(7) Any other circumstances appropriate for consideration.

[58]397 N.E.2d at 278 (citing Lockett v. Ohio, 438 U.S. 586 (1978)).

[59]397 N.E.2d at 280.

[60]*Id.*

[61]*Id.*

[62]*Id.*

[63]*Id.*

[64]*Id.* at 281. The court distinguished subsection (b)(8) as being qualitatively different from a case where some other type of aggravating circumstance is alleged. The court stated:

> Subparts (1) through (6) of subsection (b), quoted *supra*, relate directly to the crime constituting the principal charge. Very likely, the evidence which proves any of these six aggravating circumstances will have come before the jury as part of the State's case in chief in the trial of the principal charge. The prejudicial impact resulting from the introduction of this evidence at the subsequent sentencing hearing is virtually non-existent.
>
> Similarly, evidence introduced to prove subparts (7) and (9) also does not carry with it the emotional and prejudicial impact which would cause the death penalty to be imposed capriciously . . . .

court specifically limited its holding to cases where the alleged aggravating murder was not related to the principal murder charge.[65]

4. Indiana Compulsory Retirement Statute.—In *Parker v. State*,[66] a former employee of the food stamp program for the Lake County Department of Public Welfare challenged the constitutionality of Indiana Code section 4-15-8-2 which provides for compulsory retirement of state employees.[67] Parker had been retired on the first anniversary date of his employment following his seventieth birthday as required by statute. He alleged that the mandatory retirement provision violated the equal protection clause of the fourteenth amendment and the equal privileges guarantee of article 1, section 23 of the Indiana Constitution. The trial court sustained a 12(B)(6) motion for failure to state a claim upon which relief may be granted and applied a "rational basis" standard to uphold the statute.

The Indiana Court of Appeals upheld the constitutionality of the statute.[68] The court noted that challenges to mandatory retirement statutes have been uniformly rejected in other jurisdictions.[69] The court cited *Massachusetts Board of Retirement v. Murgia*,[70] wherein the United States Supreme Court rejected an equal protection challenge of a state statute which required the mandatory retirement of uniformed state policemen at the age of fifty years.[71] That Court concluded that there was no fundamental right to governmen-

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> . . . A criminal *conviction* is the substance of the proof of subpart (7), and is necessarily implied in the proof of subpart (9). We may assume that a conviction was obtained in a constitutionally proper manner. Proof of a conviction therefore carries with it the assurance that the facts underlying that conviction have already been fully established to an untainted, unbiased jury in a forum in which the full protections of the Constitution were afforded to the defendant. Thus, we do not foresee a risk that evidence of a prior *conviction* or of a life sentence will cause the death penalty to be recommended and imposed in an arbitrary and capricious manner. By contrast, if the State alleges the defendant *committed* another murder, under subpart (b)(8), the actual evidence of the crime will be presented for the first time to the sentencing jury. The facts regarding this alleged aggravating crime will never have been presented to an impartial, untainted jury, and the risk that the previously tainted jury will react in an arbitrary manner is infinitely greater.

Id. at 280-81.

[65] *Id.* at 281.

[66] 400 N.E.2d 796 (Ind. Ct. App. 1980).

[67] IND. CODE § 4-15-8-2 (1976) provides: "Every state employee which, by IC 1971, 4-13-1, is under the control of the personnel board shall be retired compulsorily on his anniversary date immediately following his attainment of seventy (70) years of age."

[68] 400 N.E.2d at 802.

[69] *Id.* at 800.

[70] 427 U.S. 307 (1976).

[71] *Id.* at 317.

tal employment[72] and rejected an argument that uniformed policemen over the age of fifty years constituted a suspect class.[73] It therefore refused to apply a "strict level" of review and upheld the constitutionality of the retirement scheme.[74]

Based upon *Murgia* and numerous cases which have followed its lead, the Indiana Court of Appeals applied a "rational basis" standard and found the statute reasonably related to the state's objectives[75] in that (1) the retirement provisions apply equally to all state employees governed by Indiana Code section 4-15-2-1,[76] (2) mandatory retirement offers an opportunity for the employment and advancement of young personnel,[77] and (3) the statute insures the physical and mental vigor of state employees while avoiding an embarrassing and time-consuming hearing to establish a mental or physical basis for retirement.[78] The court therefore concluded that there was no denial of equal protection under the equal privileges guarantee of the Indiana Constitution.[79]

5. Freedom of Religion and the Right to Unemployment Compensation.—In *Thomas v. Review Board of Indiana Employment Security Division*,[80] the appellant, a Jehovah's Witness, was employed in the roll foundry of Blaw-Knox, a manufacturing plant primarily engaged in the production of armaments. After approximately one year, the roll foundry was closed and appellant was transferred to the turret line. Upon realizing that he was now directly working on the production of armaments, appellant quit his job and filed for unemployment compensation on the basis that he voluntarily terminated employment because of religious convictions.

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[72]*Id.* at 313, wherein the Court stated, "[w]e have expressly stated that a standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment opportunities.' "

[73]*Id.* The court reasoned that:

> a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.

Id.

[74]*Id.* at 317.

[75]400 N.E.2d at 801-02.

[76]*Id.* at 802.

[77]*Id.*

[78]*Id.*

[79]*Id.*

[80]391 N.E.2d 1127 (Ind. 1979).

The Employment Security Review Board denied the claim and the appellant appealed. The Indiana Court of Appeals reversed the judgment of the Review Board and held the statute unconstitutional as applied to the appellant.[81] The court reasoned that the statute placed an "impermissible burden on his first amendment guarantee to the free exercise of his religion,"[82] and found no "compelling state interest" under the facts which justified that burden.[83]

The Indiana Supreme Court granted transfer and affirmed the Review Board's denial of compensation.[84] The court cited the Indiana Employment Security Act[85] which provides that "an individual 'who has voluntarily left his employment without good cause in connection with his work' is disqualified from receiving benefits."[86] The court stated that the purpose of the Act was to protect individuals during periods of involuntary unemployment and to encourage stable employment.[87] It noted that the statute was not intended to facilitate changing employment or to provide relief to individuals who voluntarily quit their job for personal reasons and without good cause.[88] The court cited the language of *Geckler v. Review Board of Indiana Employment Security Division*[89] that:

> As a general rule, the cases hold that "good cause," which justifies the voluntary termination of employment and entitles the claimant to compensation, must be related to the employment, and thus be *objective* in character. The cases have not extended the construction of "good cause" to include purely personal and subjective reasons which are unique to the employee, but have required that such "cause" would similarly affect persons of *reasonable* and *normal sensitivity*.[90]

The supreme court concluded that there was not a sufficient objective nexus between appellant's reason for quitting his job and his employment environment.[91] Since appellant's termination of employ-

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[81]Thomas v. Review Bd., 381 N.E.2d 888 (Ind. Ct. App. 1978), *vacated*, 391 N.E.2d 1127 (Ind. 1979).

[82]*Id.* at 895.

[83]*Id.*

[84]391 N.E.2d at 1134.

[85]IND. CODE § 22-4-15-1 (Supp. 1980).

[86]*Id.*

[87]391 N.E.2d at 1129.

[88]*Id.*

[89]244 Ind. 473, 193 N.E.2d 357 (1963).

[90]*Id.* at 477-78, 193 N.E.2d at 359.

[91]391 N.E.2d at 1130. The court indicated that a stricter standard must be applied to individuals who voluntarily *quit* work as compared to those who refuse available work. This stricter standard is designed to assist the legislative intent to reduce

ment resulted from subjective reasons, it concluded that there was not "good cause" as contemplated by the Act.[92]

The court further rejected the argument that a denial of compensation violated appellant's first amendment guarantee to the free exercise of religion.[93] The court cited the case of *Braunfeld v. Brown*[94] wherein the United States Supreme Court enunciated the rule that a law which impedes religious observance or discriminates against religion is unconstitutional even if the burden is only indirect. However, if the state regulates conduct, the purpose of which is to advance the state's secular goals, the statute is valid, even if it indirectly burdens religion.[95] The Indiana Supreme Court concluded that the compensation statute makes no religious practice unlawful, and in seeking to advance a secular purpose, the statute has only imposed an indirect burden on the appellant's free exercise of religion.[96]

The supreme court rejected appellant's reliance upon *Sherbert v. Verner*.[97] In that case, a Seventh Day Adventist was unable to find employment because of her religious beliefs against Saturday work. She was denied unemployment compensation because it was determined that her refusal to work was without good cause. The United States Supreme Court found that the denial of benefits abridged her first amendment right to the free exercise of religion.[98] The Court stated:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is

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unemployment by encouraging people to maintain their present jobs rather than to quit them. Furthermore, it recognizes that if employees place necessary conditions upon their acceptance of a new job, they will be likely to maintain that new employment. The court stated:

> This system also avoids a detailed speculative inquiry by employers of applicant's personal beliefs, conditions or unique situations prior to hiring and avoids requiring an employer to pay money from his fund for compensation to an employee who voluntarily or carelessly places himself in a position where he will have to choose between quitting work or his personal beliefs.

Id. See generally Geckler v. Review Bd., 244 Ind. 473, 193 N.E.2d 357 (1963); Gray v. Dobbs House, Inc., 357 N.E.2d 900 (Ind. Ct. App. 1976); Lewis v. Review Bd., 152 Ind. App. 187, 282 N.E.2d 876 (1972). These cases were cited and discussed by the majority opinion. 391 N.E.2d at 1129-30.

[92]391 N.E.2d at 1130.

[93]*Id.* at 1133-34.

[94]366 U.S. 599 (1961).

[95]*Id.* at 607.

[96]391 N.E.2d at 1131.

[97]374 U.S. 398 (1963).

[98]*Id.* at 410.

> unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[99]

The Indiana Supreme Court distinguished *Sherbert*. The court noted that in *Sherbert*, the appellant was given a choice between working on the Sabbath or not working at all. It therefore burdened her right to the free exercise of her religion.[100] However, in *Thomas*, the court determined that the appellant was not required by statute to violate a cardinal tenet of his religion.[101] Instead, it indicated that appellant's decision to quit his job was a personal philosophical choice rather than a religious choice or form of religious expression.[102] The court also noted that the appellant had admitted to being unsure of his religious convictions[103] and had expressed a willingness to return to the plant even though it was still engaged in armament production.[104]

There were dissenting opinions from two Justices, both concluding that *Sherbert* was controlling and that the appellant had improperly been denied compensation under the Act.[105] Justice Hunter's dissenting opinion noted that the appellant had quit his job shortly after being transferred to a part of the plant directly involved in the production of armaments.[106] It further noted that because the Review Board had made a specific finding that Thomas quit his job due to religious convictions,[107] the majority should not have under-

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[99] *Id.* at 404.

[100] 391 N.E.2d at 1132.

[101] *Id.* at 1133.

[102] *Id.* The court cites Wisconsin v. Yoder, 406 U.S. 205 (1972) for the proposition that "[a] personal philosophical choice rather than a religious choice, does not rise to the level of a first amendment claim of religious expression." 391 N.E.2d at 1131.

[103] 391 N.E.2d at 1133.

[104] *Id.* The court stated:

> Thomas is not required by statute to violate a cardinal tenet of his religion. Our review of the record here reveals that the basis of claimant's belief is unclear. The precise belief is not articulated. He does not show how the exercise of his religious beliefs is hampered. He is not prevented from seeking, being available for, or accepting new work. He is not deprived of benefits extended to others. *Sherbert* does not require that benefits be extended to this claimant. To so require would be an improper expansion of that holding.

Id. at 1133-34.

[105] *Id.* at 1134-36 (Hunter, J., dissenting); *id.* at 1136-37 (DeBruler, dissenting).

[106] *Id.* at 1134 (Hunter, J., dissenting).

[107] *Id.*

rated appellant's beliefs merely because they were not eloquently stated or because appellant was struggling with those beliefs.[108] The dissent argued that it was improper to distinguish between literal and interpretative readings of religious scriptures or to distinguish between the "cardinal tenets" of various religions.[109]

6. Sex Discrimination and Grooming Standards in Private Industry.—In *The Indiana Civil Rights Commission v. Sutherland Lumber*,[110] two retail lumberyard employees brought sexual discrimination complaints against their employer under the Indiana Civil Rights Act.[111] The two employees were fired when they refused to shave their moustaches to comply with a private employer's grooming standards. The Indiana Civil Rights Commission (ICRC) determined that they were victims of sexual discrimination. This determination was rejected by the Indiana Court of Appeals.

The court of appeals determined that this case was one of first impression in Indiana.[112] They turned to federal case law which has interpreted Title VII of the Civil Rights Act of 1964 in the context of grooming standards of private employers. The court relied upon the analysis of the Fifth Circuit Court of Appeals in *Willingham v. Macon Telegraph Publishing Co.*[113] In *Willingham*, the Macon Telegraph management concluded that local sentiment against long-haired males was so intense that business necessities required a policy that these individuals be refused employment. Willingham brought a complaint against Macon Telegraph alleging that their policy discriminated against males on the basis of sex, since female employees were permitted to wear their hair at any length. The Fifth Circuit rejected this contention and concluded that the discrimination practiced by Macon Telegraph was based upon grooming standards and not upon sex.[114]

The Fifth Circuit Court of Appeals noted that the case involved

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[108]*Id.* at 1135.

[109]*Id.* The dissent stated, "We are dealing here with a person's action pursuant to his religious beliefs, and cannot properly tell a litigant that he has misinterpreted his own beliefs." *Id.* (Hunter, J., dissenting).

[110]394 N.E.2d 949 (Ind. Ct. App. 1979).

[111]IND. CODE § 22-9-1-1 (1976 & Supp. 1980).

[112]394 N.E.2d at 954.

[113]507 F.2d 1084 (5th Cir. 1975), *enbanc vacating* 482 F.2d 535 (5th Cir. 1973).

[114]*Id.* at 1088. *See* Longo v. Carlisle DeCoppet & Co., 537 F.2d 685 (2d Cir. 1976); Knott v. Missouri Pac. R.R., 527 F.2d 1249 (8th Cir. 1975); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973); Fangan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973). *But see* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971); Aros v. McDonnell Douglas Corp., 348 F. Supp. 661 (C.D. Cal. 1972); Donohue v. Shoe Corp. of America, 337 F. Supp. 1357 (C.D. Cal. 1972).

no state action and no discrimination based upon sex alone.[115] Rather, the court noted that a more subtle form of discrimination existed. This form of discrimination has been characterized as "sex plus,"[116] which involves the classification of employees on the basis of sex, plus one other ostensibly neutral characteristic.[117] The court stated:

> The practical effect of interpreting Sec. 703 to include this type of discrimination is to impose an equal protection gloss upon the statute, i.e. similarly situated individuals of either sex cannot be discriminated against vis-à-vis members of their own sex unless the same distinction is made with respect to those of the opposite sex.[118]

Willingham argued that "sex plus" must include "sex plus any sexual stereotype" and since short hair is stereotypically male, a grooming standard which requires short hair of all males is sex discrimination as contemplated by Title VII of the Civil Rights Act. The Fifth Circuit rejected this argument and determined that Congress intended Title VII to guarantee equal job opportunities for males and females.[119] The court stated:

> [A]n employer cannot have one hiring policy for men and another for women *if* the distinction is based on some fundamental right. But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity.[120]

The court concluded that hair length is not immutable and enjoys no constitutional protection in the context of employer grooming standards.[121]

The Indiana Court of Appeals applied the reasoning of the federal cases which have followed the Fifth Circuit. The court of appeals adopted *Willingham's* three-tier analysis in determining whether there had been sex discrimination under the Indiana Civil Rights law.[122] This three-tier analysis queries:

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[115]507 F.2d at 1088.
[116]*Id.* at 1088-89.
[117]*Id.* at 1089.
[118]*Id.*
[119]*Id.* at 1091. *See* 42 U.S.C. § 2000e-2 (1976).
[120]507 F.2d at 1091.
[121]*Id.*
[122]394 N.E.2d at 954.

> (1) Has there been some form of discrimination in that similarly situated individuals have received different treatment?; (2) If so, was the discrimination one which the legislative body intended to forbid as sex discrimination?; and (3) If so, may the practice be justified by the employer as a legally permissible bona fide occupational qualification?[123]

The court found discrimination under the first tier in that similarly situated employees at Sutherland Lumber had in fact received dissimilar treatment.[124] Under the second tier of the analysis, however, the court concluded that the dissimilar treatment did not amount to sex discrimination.[125] The ICRC argued that the ability to grow a beard is an immutable characteristic of males and that Sutherland Lumber's policies amounted to "sex plus" discrimination designed to deny equal opportunity by perpetuating a sexual stereotype. The court of appeals rejected this argument.[126] It reasoned that the Indiana Civil Rights legislation was designed to provide equal employment opportunity and to prevent employer discrimination which violates the fundamental rights of employees or is based upon a classification wherein the disfavored class bears some immutable characteristic.[127] It determined that even though an individual has a right to wear a beard or moustache, this is not a fundamental right.[128] Furthermore, it also rejected the argument of the ICRC that the ability to grow facial hair is an immutable characteristic of males.[129] The court said that facial hair is not an absolute characteristic like race, national origin, or color; rather, it can be changed through shaving and therefore is an indicium of an individual's personal mode of dress or a desired cosmetic effect.[130]

The court concluded that "[t]he right of an employer to promulgate grooming regulations to project a certain image is recognized as an aspect of managerial responsibility necessary in a competitive business environment."[131] Therefore, an "employer is not required [by the Indiana Civil Rights legislation] to account for the personal preferences of its employees in respect to grooming standards."[132]

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[123] *Id.*

[124] *Id.* at 955.

[125] *Id.* at 957.

[126] *Id.* at 956.

[127] *Id.* at 955-56.

[128] *Id.* at 955.

[129] *Id.* at 956.

[130] *Id.* (citing Baker v. California Land Title Co., 507 F.2d 895, 897 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975)).

[131] 394 N.E.2d at 956.

[132] *Id.*

The court recited the language of the United States Appellate Court for the District of Columbia which stated:

> Some courts have analogized hair-length regulations to the requirement that men and women use separate toilet facilities or that men not wear dresses. Admittedly these are extreme examples, but they are important here because they are logically indistinguishable from hair-length regulations. These examples, like hair-length regulations, are classifications by sex which do not limit employment opportunities by making distinctions based on immutable personal characteristics, which do not represent any attempt by the employer to prevent the employment of a particular sex, and which do not pose distinct employment disadvantages for one sex. Neither sex is elevated by these regulations to an appreciably higher occupational level than the other. We conclude that Title VII never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities.[133]

Applying this rationale to its interpretation of Indiana's Civil Rights legislation, the court concluded that the ICRC had improperly construed the legislation in finding sex discrimination by Sutherland Lumber.[134]

7. Indiana Locker Law Statute.—During this survey period, the Indiana General Assembly enacted a statute concerning the search of school lockers.[135] The question of the statute's validity, in

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[133]*Id.* (citing Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336-37 (D.C. Cir. 1973).

[134]394 N.E.2d at 957.

[135]IND. CODE § 20-8.1-5-17 (Supp. 1980) reads as follows:

(a) A student using a locker that is the property of a school corporation is presumed to have no expectation of privacy in that locker or its contents.

(b) A principal or other member of the administrative staff of a school designated in writing by the principal may, in accordance with the rules of the governing body of that school corporation, search such a locker and its contents at any time. The school corporation shall provide each student and each students' (sic) parents a written copy of all the rules of the governing body at that school corporation regarding searches of lockers and their contents.

(c) Other than a general search of lockers of all students, any search conducted under this section shall be, where possible, conducted in the presence of the student whose assigned locker is the subject of the search.

(d) A law enforcement agency having jurisdiction over the geographic area in which is located the school facility containing such a locker may, at the request of the school principal and in accordance with rules of the governing body of that school corporation, assist the school administrators in searching such a locker and its contents.

reference to the fourth amendment rights of students, is raised.[136]

In general, the statute grants the principal or his designated representative, authority to search a student's locker and the contents therein at any time.[137] The student and his parents shall be furnished a copy of the school's rules regarding locker searches.[138] A search pursuant to this statute, other than a general search of all lockers, must be made in the student's presence, whenever possible.[139] Finally, any law enforcement agency with authority over the district in which the school is located may be asked to assist the school administrators in carrying out a locker search.[140]

Utilizing the United States Supreme Court's language found in *Rakas v. Illinois*,[141] the legislature has deemed it appropriate to remove any "expectation of privacy in . . . [the] . . . locker or its contents."[142] With no reasonable privacy expectation, a student would lack standing to object to the lawfulness of a search of his locker.[143] In *Doe v. Renfrow*,[144] the United States District Court for Northern Indiana in a memorandum opinion on canine searches of students held that the school administrators stood *in loco parentis* to the students and therefore could conduct the search. The *in loco parentis* relationship modifies a student's fourth amendment rights so that a search may be conducted when school officials have reasonable cause to believe a student has violated or is violating a school policy.[145]

It is clear that a student does not lose his rights guaranteed by the fourth amendment or any other constitutional provision by entering the schoolhouse.[146] Therefore, the student's right to be free

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[136]U.S. CONST. amend. IV.

[137]IND. CODE § 20-8.1-5-17(b) (Supp. 1980).

[138]*Id.*

[139]*Id.* § 20-8.1-5-17(c).

[140]*Id.* § 20-8.1-5-17(d).

[141]439 U.S. 128 (1978). *See* Katz v. United States, 389 U.S. 347 (1967).

[142]IND. CODE § 20-8.1-5-17(a) (Supp. 1980).

[143]The *Rakas* case involved a situation in which two robbery suspects were stopped while in a car. A search of the car by police revealed a box of rifle shells in the glove compartment and a sawed-off rifle below the seat. Neither of the two occupants of the car asserted any property or possessory interest in the car searched nor any interest in the seized articles. Therefore, they failed to show any legitimate expectation of privacy and could not challenge the constitutionality of the search. 439 U.S. 128 (1978).

[144]475 F. Supp. 1012 (N.D. Ind. 1979).

[145]*Id.* at 1019. It should be noted that the search of students herein was only for school purposes and not to initiate any criminal prosecutions. The court noted that its position might well have been different if such a motive was the purpose of the search. *Id.* at 1024.

[146]Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

from unreasonable search and seizures must be balanced against the need of school administrators to maintain order and discipline and to fulfill their duties under the *in loco parentis* doctrine in protecting the student's health and welfare.[147] Consequently, it is unclear where the Indiana courts will stand on the locker statute.[148] In any event, the question of its constitutionality will provide fertile ground for testing under the polestar of the fourth amendment standard, and it remains to be seen whether our legislature will receive a passing grade.

C. *Federal Decisions*

1. Indiana Wrongful Death Statute.—The constitutionality of Indiana's wrongful death statute[149] was challenged in *Huff v. White Motor Corp.*[150] In that case, the administratrix of the estate of a deceased truck driver initiated a wrongful death action against the truck manufacturer based upon defective design of the fuel system which was alleged to have caused the fire resulting in the driver's death.[151] A trial by jury resulted in judgment for the plaintiff,[152] and the defendant appealed with the plaintiff bringing a cross-appeal.[153]

The plaintiff argued in the cross-appeal that the wrongful death statute provides for punitive damages and that the jury should have

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[147]M. v. Board of Educ., 429 F. Supp. 288 (S.D. Ill. 1977). *Cf.* Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977), and Moore v. Student Affairs Comm., 284 F. Supp. 725 (M.D. Ala. 1968) (rejecting the *in loco parentis* reasoning).

[148]*See generally* Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739 (1974); Comment, *Students and the Fourth Amendment: Myth or Reality?* 46 U.M.K.C.L. REV. 282 (1977); Comment, *Search and Seizure—School Officials' Authority to Search Students is Augmented by the* In Loco Parentis *Doctrine*, 5 FLA. ST. U. L. REV. 526 (1977).

[149]IND. CODE § 34-1-1-2 (1976), provides in relevant part:

> When the death of one is caused by the wrongful act or omission of another, . . . the damages shall be in such an amount as may be determined by the court or jury, including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission.

[150]609 F.2d 286 (7th Cir. 1979).

[151]This aspect of the case and a detailed explanation of the factual background are more fully analyzed in Vargo & Leibman, *Products Liability, 1979 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 237 (1979).

[152]The United States District Court for the Southern District of Indiana granted summary judgment for the manufacturer, and the administratrix appealed. 418 F. Supp. 232 (S.D. Ind. 1976), *rev'd*, 565 F.2d 104 (7th Cir. 1977). On remand from the court of appeals the district court entered judgment on a jury verdict for the plaintiff in the amount of $700,000.00. 609 F.2d at 289.

[153]The court of appeals eventually remanded the case again for a determination of the decedent's competence concerning a statement excluded at trial. Because a new trial was conditioned on this factual determination by the district court, the court proceeded to deal with the issue discussed in this article. 609 F.2d at 297.

been allowed to consider awarding them as a part of the wrongful death recovery.[154] The plaintiff alternatively contended that if the statute does not provide for punitive damages, it violates the equal protection clause of the United States and Indiana Constitutions by discriminating against wrongful death claimants, in favor of property damage and personal injury plaintiffs, who may recover punitive damages.[155]

The court dealt with the first aspect of this two-pronged attack by stating that punitive damages are clearly not compensation for an injury, but are meant solely to punish and deter reprehensible conduct.[156] Prior to this amendment to the wrongful death statute, punitive damages were not recoverable because the only purpose of this statute was to compensate wrongful death claimants for pecuniary losses.[157] Recognizing that there have been no Indiana court decisions on this issue since 1965[158] the court concluded that the wrongful death statute still does not authorize an award of punitive damages.[159]

The court said that it believed the Indiana legislature used the phrase "including, but not limited to" to make evident that by enumerating the recoverable damages, the jury could also consider other factors in arriving at the *compensatory* damages.[160]

The court then addressed the plaintiff's constitutional attack on disallowing punitive damages. The plaintiff contended that such disallowance violated the equal protection clauses of the United States and Indiana Constitutions.[161] The court rejected this contention and upheld the statute, stating that this legislative classification did not involve race or other immutable human attributes,[162]

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[154]*Id.*

[155]*Id.* at 298. *See* U.S. CONST. amend. XIV; IND. CONST. art. 1, § 23.

[156]609 F.2d at 297 (citing International Bhd. of Elec. Workers v. Foust, 99 S. Ct. 2121, 2125 (1979). Quoting Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the court stated, "Punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Id.* at 350.

[157]*See* Lindley v. Sink, 218 Ind. 1, 14-15, 30 N.E.2d 456, 461 (1940).

[158]In Estate of Pickens v. Pickens, 255 Ind. 119, 263 N.E.2d 151 (1970) the Indiana Supreme Court, citing pre-1965 cases, stated that the purpose of the present statute was "to create a cause of action to provide a means by which those who have sustained a loss by reason of the death may be compensated." *Id.* at 126, 263 N.E.2d at 155. *Accord* Bocek v. Inter-Insurance Exch., 369 N.E.2d 1093, 1096-97 (Ind. Ct. App. 1977).

[159]609 F.2d at 297.

[160]Examples of these factors given by the court include loss of care, love and affection, and loss of training and guidance for children. *See also* American Carloading Corp. v. Gary Trust & Sav. Bank, 216 Ind. 649, 660, 25 N.E.2d 777, 782 (1940).

[161]609 F.2d at 298.

[162]*Id. See* Parham v. Hughes, 441 U.S. 347, 351 (1979).

and did not affect fundamental rights.[163] Therefore, it is granted a presumption of validity absent a showing that the legislature's actions in establishing it were irrational.[164] The court concluded by stating that the equal protection clause of the Indiana Constitution is co-extensive and consistent with the federal clause.[165]

2. Indiana Statute Relating to Unobstructed View at Railroad Crossing.—In another wrongful death setting the Seventh Circuit Court of Appeals examined the constitutionality of Indiana's statute relating to unobstructed view at railroad crossings. In *Menke v. Southern Railway*,[166] the defendant contended that the Indiana statute[167] was void for vagueness because no person of reasonable and ordinary intelligence would have notice of the railroad's duty,[168] because the statute arguably failed to specify at what distance from the track a motorist must have an unobstructed view.[169]

The court upheld the Indiana statute by stating that it was not impermissibly vague.[170] In this area of legislative draftsmanship, the courts have allowed greater leeway in imprecise phrasing.[171] The court stated:

> In our view the language of the Act when considered against the background of its obvious purpose to protect motorists from hidden trains at rail crossings, its relation to other Indiana statutes, and the variety of conditions which may be

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[163]609 F.2d at 298.

[164]*Id. See also* Vance v. Bradley, 440 U.S. 93, 97 (1979).

[165]609 F.2d at 298; *See* Haas v. South Bend Community School Corp., 259 Ind. 515, 526, 289 N.E.2d 495, 501 (1972).

[166]603 F.2d 1281 (7th Cir. 1979).

[167]IND. CODE § 8-6-7.6-1 (1976) provides:

> Each railroad in the State of Indiana shall maintain each public crossing under its control in such a manner that the operator of any licensed motor vehicle has an unobstructed view for fifteen hundred (1500) feet in both directions along the railroad right-of-way subject only to terrain elevations or depressions, track curvature, or permanent improvements.

[168]*See* United States v. National Dairy Corp., 372 U.S. 29 (1963); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952); U.S. CONST., amend. XIV; IND. CONST. art. 1, § 12. Although the defendant raised this issue for the first time on appeal, thereby waiving any constitutional objection, the court treated the issue as if properly raised. 603 F.2d at 1283.

[169]The defendant based his constitutional attack upon two state court decisions which struck down statutes requiring motorists to slow down at obstructed intersections or railroad crossings. Missel v. State, 33 Okla. Crim. 376, 244 P. 462 (1926); Galveston, H. & S. A. Ry. Co. v. Duty, 277 S.W. 1057 (Tex. Civ. App. 1925) (opinion adopted in its entirety by the Texas Supreme Court).

[170]603 F.2d at 1283.

[171]*See* Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952); Baltimore & O.R.R. v. Groeger, 266 U.S. 521 (1925).

> present at railroad crossings, is reasonably clear, if not mathematically precise. Due process requires no more.[172]

It interpreted the statute to mean that the view required to be given a motorist was at that point where the highway intersects with the edge of the right-of-way for the railroad. Reading this statute, together with the statute requiring motorists to stop at a railroad crossing when "an approaching train is plainly visible and is in hazardous proximity to such crossing,"[173] reinforces the legislative policy under the Act.[174]

The court concluded that the statute was not impermissibly vague and falls clearly within the flexible boundaries which the due process clause places on the legislative function.[175]

3. The Foster Parent-Child Relationship and Due Process of Law.—In *Kyees v. County Department of Public Welfare*,[176] the Seventh Circuit Court of Appeals ruled upon the due process rights of foster parents and the children placed in their care.

In this particular situation, a child[177] was placed in the care of the foster parents through a standard foster care contract, which provided for a per diem amount for the temporary care of the child.[178] The record indicated that the defendants told the foster parents that placement was only short-term, and that the couple would not be considered as adoptive parents for the child.[179] Furthermore, the contract did not create any anticipation for a long-term relationship.[180] However, the foster parents continued to express interest in and emotional attachment for the child, and eventually attempted to adopt him over the defendants' objections.[181] When this

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[172]603 F.2d at 1283.

[173]IND. CODE § 9-4-1-106(d) (1976).

[174]603 F.2d at 1283-84.

[175]*Id.* at 1284.

[176]600 F.2d 693 (7th Cir. 1979).

[177]The child was born out of wedlock on November 28, 1972. His father was unknown and his mother lacked the physical and mental capacity to care for him. On May 18, 1973, he became a ward of Tippecanoe County and was placed with two foster families before being placed in the home of Charles and Pauline Kyees. *Id.* at 694.

[178]*Id.* at 694-95.

[179]*Id.* at 695.

[180]*Id.*

[181]The Kyees filed a petition in the Tippecanoe Circuit Court seeking waiver of the necessity of defendants' approval for the adoption. The defendants opposed the adoption for three reasons: (1) The Kyees were respectively 66 and 50 years of age, and the defendants sought adoptive parents who would likely be living through the child's teenage years; (2) The Kyees had more knowledge about this particular child's background than would normally be allowed adoptive parents; and (3) Defendants felt that Mrs. Kyees did not place sufficient importance on the child's continued therapy at the Wabash Center. The court denied the petition and no appeal was taken. *Id.*

failed, the foster parents encouraged a local adoption so they could continue having contact with the child as "foster grandparents."[182] A petition for local adoption was eventually filed and dismissed because the defendants again did not consent to the adoption.[183] At the time of the original action supporting this appeal, the record indicated that the child had been adopted by an out-of-state couple.[184]

In the appeal, arising from the dismissal of a complaint filed in federal district court,[185] the plaintiffs raised the issue of whether the defendants must accord them due process before removing a foster child who had been in their care for a substantial period of time.[186]

The court began its analysis by stating the issue as follows:

> We have no difficulty in narrowing the case to the question whether the relationship between plaintiffs and John Joe [foster child] created a liberty interest which the state could not impair without due process. We see no property interest involved, and no fundamental rights wholly beyond the power of the state.[187]

However, it chose not to rest the crux of its decision on whether due process was fulfilled,[188] but rather chose to address the issue whether a foster care relationship creates a constitutionally protected liberty interest.[189]

The court began by stating that there does exist a "private realm of family life which the state cannot enter."[190] The difficulty lies in determining what actually constitutes a "family." Where the

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[182]*Id.* at 695-96.

[183]On July 28, 1975, a local couple filed with the Tippecanoe Circuit Court a petition to adopt the child. The defendants were granted summary judgment because they did not consent to the adoption. An appeal of that decision is pending before the Indiana Court of Appeals. *Id.* at 696.

[184]*Id.*

[185]An action was filed on September 30, 1975, in federal district court naming the foster parents, the local couple who sought adoption, and the child as plaintiffs. This was a civil rights action arising under 42 U.S.C. § 1983. The foster parents' claims were dismissed upon defendants' motion for summary judgment. The court stayed a consideration of the claims of the local couple seeking adoption pending the resolution of their appeal based on denial of the adoption. *Id.* at 696-97.

[186]*Id. See* U.S. CONST., amend. V and XIV.

[187]600 F.2d at 697.

[188]*Id.*

[189]*Id.* at 697-99. In this regard, the court noted that the Kyees have had their "day in court" at the state level and that the adoption issue they raised therein is very similar to the issue of whether the child's best interests were served by removal from their home for adoption. Also, the defendants told the Kyees in advance of their plans for the child. The court thereupon chose to view the issue from the standpoint of the nature of the plaintiffs' interests.

[190]*Id.* at 697 (quoting Prince v. Massachusetts, 321 U.S. 158 (1944)).

relationship is biological, the state's power to regulate is severely curtailed.[191] However, other familial relationships are less protected. Therefore, the question is whether the relationship of the Kyees and their foster child constituted a "family."[192]

The United States Supreme Court discussed this issue of foster family relationships in *Smith v. Organization of Foster Families*.[193] Although the Court did not decide whether the situation presented was of such a protected nature that the state could not disturb it without an accordance of due process,[194] it did state that "the usual understanding of 'family' implies biological relationships," but that these relationships are "not exclusive determination[s] of the existence of a family."[195] Moreover, it observed that the emotional relationship and attachment between a foster parent and foster child is similar to that found in a traditional relationship.[196] The Court held that it is appropriate to scrutinize the applicable state law to ascertain the extent of the liberty interests being jeopardized.[197]

Relying heavily upon this analysis, the Seventh Circuit Court of Appeals examined several Indiana statutes that dealt with the status of children and the type of contracts executed by the foster parents.[198]

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[191]*Id. See* Moore v. City of East Cleveland, 431 U.S. 494 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972); Drollinger v. Milligan, 552 F.2d 1220 (7th Cir. 1977).

[192]600 F.2d at 698; *Compare* Belle Terre v. Boraas, 416 U.S. 1 (1974), where a village zoning ordinance limited, with some exceptions, the occupancy of all one-family housing units to traditional families or groups of not more than two unrelated persons, and was upheld as not being aimed at transients, nor involving any deprivation of a fundamental right nor procedural disparity, and as bearing a rational relationship to a permissible state objective *with* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973), where an amendment to the Food Stamp Act which excluded from eligibility any household with an individual unrelated to any other household member was held to be an irrational classification in violation of the equal protection component of the due process clause of the fifth amendment.

[193]431 U.S. 816 (1977).

[194]The Court analyzed the New York procedures that are required before a foster child can be taken from the foster parents. The Court concluded that these procedures adequately protected whatever liberty interests were at stake. *Id.*

[195]*Id.* at 843.

[196]*Id.* at 844. The United States Supreme Court stated:

> At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child and fulfill the same socializing functions as a natural family.

Id.

[197]*Id.* at 816.

[198]600 F.2d at 698 (citing IND. CODE § 31-5-7-1 (1976) (repealed 1978) (regarding care of juveniles); *id.* § 31-1-11.5-21 (1976) (regarding child custody in divorce proceedings); *id.* § 31-3-1-8 (1976 & Supp. 1980) (regarding adoption proceedings); *id.* § 29-1-18-25

The court reasoned that as in *Smith*,[199] there was an overwhelming likelihood of eventual termination of the foster relationship and, therefore, the liberty interests at stake were much more limited than those enjoyed by natural or adopted family relationships.[200]

Additionally, relying on a similar case decided by the Fifth Circuit[201] the court held that the Kyees did not have such a liberty interest, based upon the facts presented, to claim a violation of their due process rights.[202]

The foster relationship area is an unusually difficult one because the legal problems presented are frequently overrun by emotional overtones. Until the proper fact situation, which may be said to constitute a protectable liberty interest, reaches an appellate court, the placement agency involved will continue to make all the decisions.[203]

4. A University Faculty Member's Right to Freedom of Speech.—In *Eichman v. Indiana State University Board of Trustees*,[204] the Seventh Circuit Court of Appeals gave additional breadth to a university faculty member's right to speak[205] critically of university policies without the fear of retaliatory discharge.[206]

Eichman wrote several memoranda criticizing the scheduling and curriculum policies at Indiana State University at Evansville (ISUE). The court noted that these memoranda were considered by ISUE in its decision not to rehire Eichman. Relying upon the United States Supreme Court case of *Givhan v. Western Line Consolidated School District*,[207] the court held that when a faculty member expresses criticism of university policies, the remarks are entitled to

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(1976) (regarding guardianship proceedings); *id.* § 12-3-3-2 (regarding neglect or dependency hearings)).

[199]431 U.S. 816 (1977).

[200]600 F.2d at 698.

[201]Drummond v. Fulton County Dep't of Family & Child Serv., 547 F.2d 835 (5th Cir. 1977). In that case, which is closely analogous to the facts herein, a panel decided that foster parents had liberty rights of which they could not be deprived without a due process hearing. Rehearing *en banc* was granted. The court decided that there was no constitutionally protected interest within the factual scope of the case. 563 F.2d 1200, 1206 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978).

[202]600 F.2d at 699.

[203]The opinion in *Kyees* did state that Justice Fairchild felt that a foster family relationship of this type can constitute a family as described in Smith, and that the family members do have liberty interests at stake of which they cannot be deprived without due process of law. *Id.*

[204]597 F.2d 1104 (7th Cir. 1979).

[205]U.S. CONST. amend. I.

[206]On appeal the plaintiff also claimed on a Title VII infringement, violations of his substantive and procedural due process rights, violation of his right to equal protection, and violation of his right to privacy. 597 F.2d at 1109-10. While these allegations make interesting reading, they will not be discussed in the context of this Article.

[207]439 U.S. 410 (1979).

first amendment protection.[208] In *Givhan*, the Supreme Court did not recognize any distinction between public and private speech in the context of critical remarks made directly to the teacher's principal.[209] The remarks were within the ambit of protections afforded by the first amendment.[210]

Herein, the court concluded that it was reversible error to hold that the memoranda written by Eichman were outside the scope of first amendment protection.[211] Thus, one's right to speak freely and critically within a university setting was preserved.

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[208]597 F.2d at 1108.
[209]439 U.S. at 415-16.
[210]*Id.* at 413.
[211]597 F.2d at 1108.

VI. Contracts, Commercial Law, and Consumer Law

GERALD L. BEPKO*

A. Introduction

The following discussion reviews some of the most important developments during the past year in contracts, commercial, and related consumer law. Some of the developments which raise contract, commercial, or related consumer law problems may also raise questions concerning secured transactions or creditors' rights and may be discussed in the portion of the Survey devoted to those subjects.[1] No effort will be made to duplicate the analysis of statutes and cases considered in that part of the Survey.

B. Scope of UCC Article 2

In *Stephenson v. Frazier*,[2] the Indiana Court of Appeals examined the applicability of Article 2 of the Uniform Commerical Code[3] (UCC) to an agreement by which there was a commitment to both deliver goods and provide services. The agreement involved the sale of a modular home along with a commitment by the seller to construct a septic system and a foundation on the rural property on which the modular home was to be assembled. The court's analysis began with the premise that UCC Article 2 applies to "transactions in goods"[4] and that the word "goods" means "all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale."[5] Of course, under this definition, the modular home constituted goods. However, the commitment to construct the foundation and septic system was a different matter. It did not constitute an agreement for the sale of goods but, instead, was an agreement to provide services. Generally, agreements to provide services are governed by common law contract principles.[6]

When faced with the question of whether to apply UCC Article 2, or principles of the common law of contracts, some courts have

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[1]Townsend, *Secured Transactions and Creditors' Rights, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. (1981).

[2]399 N.E.2d 794 (Ind. Ct. App. 1980).

[3]U.C.C. §§ 2-101 to -725. All sections hereinafter cited to the U.C.C. are also found in IND. CODE §§ 26-1-1-101 to -3-7-36 (1976 & Supp. 1980).

[4]U.C.C. § 2-102; IND. CODE § 26-1-2-102 (1976).

[5]U.C.C. § 2-105(1); IND. CODE § 26-1-2-105(1) (1976).

[6]J. CALAMARI & J. PERILLO, CONTRACTS § 1-7, at 16-17 (2d ed. 1977).

concluded that the dominant feature of the contract should control;[7] if the sale of goods is predominant, UCC Article 2 governs; if the commitment to provide service is predominant, common law contract principles govern. In the *Stephenson* case the court took a different approach and concluded that agreements should be divided into components. Those components of the agreement which involved the sale of goods (goods components) were governed by UCC Article 2; those components of the agreement which involved the sale of services (service components) were governed by common law contract principles.[8] The substantive issue raised in the *Stephenson* case had to do with whether the buyer could call off the deal by virtue of the seller's breach. The court addressed the goods component under UCC Article 2 in terms of rejection,[9] cure,[10] revocation[11] and cancellation.[12] The court addressed the services component under principles of the common law of contracts in terms of rescission and substantial breach.[13]

This analysis is logical, yet it may be difficult to apply in cases where the contract cannot be easily divided, such as a contract for laying an asphalt driveway.[14] Also, this approach could lead to difficulties where the substantive issue is not related to performance, but is related to creation of the agreement, such as a question concerning the Statute of Frauds. For example, a court could find that the services component may be enforced, but the goods component could not be enforced because of a failure to satisfy the writing requirement of UCC 2-201(1).[15] Partial enforcement of the contract could result in prejudice to the seller who may have offered services at a lower price because the goods were being sold as part of the same transaction.[16]

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[7]*See, e.g.*, Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572 (7th Cir. 1976).

[8]399 N.E.2d at 797.

[9]IND. CODE § 26-1-2-601 (1976).

[10]*Id.* § 26-1-2-508.

[11]*Id.* § 26-1-2-608.

[12]*Id.* § 26-1-2-711.

[13]399 N.E.2d at 798. The trial court had dismissed the buyer's suit for rescission. The court of appeals reversed; it held that with respect to the services component the buyer had made a prima facie case that the seller's failure to perform constituted a material breach of the entire contract.

[14]*See* Rose Acre Farms, Inc. v. L.P. Cavett Co., 151 Ind.App. 268, 279 N.E.2d 280 (1972).

[15]IND. CODE § 26-1-2-201(1) (1976).

[16]This may be similar to the problem that arises in cases where part payment or part performance provides a basis for enforcement of the contract. *See* U.C.C. § 2-201(3)(a), (b); IND. CODE § 26-1-2-201(3)(a), (b) (1976). In those instances the contract is enforceable only to the extent of payment or performance which may result in the

C. *Are Farmers Merchants?*

The question of whether a farmer is a merchant under UCC 2-201(2)[17] has been litigated in a number of states with somewhat mixed results.[18] These cases have usually involved an alleged oral contract for the sale of grain by a farmer to a grain dealer. The grain dealer usually has sent a written confirmation of the alleged oral contract to the farmer, and the farmer has failed to register an objection to the confirmation. When the grain dealer has sued on the alleged oral contract, the farmers have defended with the Statute of Frauds writing requirement of UCC 2-201(1).[19] Grain dealers have countered with UCC 2-201(2) which provides that

> [b]etween merchants if within a reasonable amount of time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.[20]

The farmer has generally claimed that he is not a merchant, and thus the transaction is not "between merchants." If the transaction is not between merchants, UCC 2-201(2) does not apply, and the Statute of Frauds defense could be successful since there is no writing signed by the farmer—the person against whom enforcement is being sought.

This year, the Indiana Court of Appeals addressed this question in *Sebasty v. Perschke.*[21] In the *Sebasty* case the defendant had

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same prejudice as described in the text. However, that is an unavoidable conclusion produced by a statute. The courts should be reluctant to reach that conclusion in the absence of a specific direction in a statute. For a discussion of the problem of the prejudice resulting from partial enforcement and a proposed solution see R. NORDSTROM, HANDBOOK ON THE LAW OF SALES § 27, at 71 (1970).

[17]IND. CODE § 26-1-2-201(2) (1976).

[18]*See* Cook Grains, Inc. v. Fallis, 239 Ark. 962, 395 S.W.2d 555 (1965) (not a merchant); Sierens v. Clausen, 60 Ill. 2d 585, 328 N.E.2d 559 (1975) (farmer is a merchant); Campbell v. Yokel, 20 Ill. App. 3d 702, 313 N.E.2d 628 (1974) (farmer is a merchant); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 547 P.2d 323 (1976) (not a merchant); Ohio Grain Co. v. Swisshelm, 40 Ohio App. 2d 203, 318 N.E.2d 428 (1973) (farmer is a merchant); Lish v. Compton, 547 P.2d 223 (Utah 1976) (not a merchant).

[19]U.C.C. § 2-201(1) (1978 version) provides that

> a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . . .

IND. CODE § 26-1-2-201(1) (1976).

[20]IND. CODE § 26-1-2-201(2) (1976).

[21]404 N.E.2d 1200 (Ind. Ct. App. 1980).

been a farmer all his life and owned 1300 acres of land, of which 1000 were farmed. Three crops were grown on the land and sold by Sebasty as a means of earning his livelihood. Sebasty was familiar with the customs and practices involved in selling grain, was aware that the price of grain rises and falls daily, and had entered into four other oral agreements with the grain dealer for future sales which were followed by written confirmations. On the basis of these characteristics, the court of appeals affirmed the trial court decision that the farmer was a merchant.[22] This conclusion was supported by two separate aspects of the definition of the word "merchant." UCC 2-104(1) provides that a merchant is "[a] person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction."[23] First, the court emphasized that in this context the test for merchant status is whether the farmer has by his occupation represented or held himself out as having knowledge or skill peculiar to the *practices* in the transaction.[24] The court said that "[a] person whose livelihood includes the selling of a commodity necessarily represents to those who purchase the commodity that he has the skill and knowledge involved in such a sale."[25] Second, the court found that the farmer was a merchant for a separate and independent reason. If a person deals in goods of the kind involved then the dealer is a merchant for the transaction. The court held that a farmer who regularly sells his crops is a person who deals in

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[22]*Id.* at 1203.

[23]IND. CODE § 26-1-3-104(1) (1976).

[24]It is important to recognize that the definition of merchant has two different points of focus: The *practices* in the transaction or the *goods* involved in the transaction. For purposes of the problem in this case and other questions involving offer, acceptance, or modification, the *practices* focus of the definition is most important. Official Comment 2 of U.C.C. § 2-104 (1978 version) provides that for purposes of these formation questions

> almost every person in business would . . . be deemed to be a "merchant" under the language "who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . ." since the practices involved in the transaction are non-specialized business practices such as answering mail.

On the other hand, if the issue has to do with one of the UCC provisions dealing with quality, such as the warranty of merchantability, the emphasis shifts. In that case the warranty is created only "'if the seller is a merchant with respect to goods of that kind.'" U.C.C. § 2-314(1); IND. CODE § 26-1-2-314(1) (1976). There is a third group of cases in which merchant status is to be measured either by the practices or the goods involved in the transaction. This group deals with such things as merchant buyer's responsibility for following seller's instruction (U.C.C. § 2-603 (1978 version)) or risk of loss (U.C.C. § 2-509 (1978 version)) or adequate assurances of performance (U.C.C. § 2-609 (1978 version)).

[25]404 N.E.2d at 1202-03.

goods of that kind and is a merchant in those transactions in which he sells his crops.[26]

D. Recovery of Attorney's Fees in Consumer Warranty Actions

Where defective consumer products cause personal injury or property damage, the stakes are usually high enough to justify a suit against the seller. The costs of the suit, particularly the fee for the plaintiff's attorney, can usually be paid out of the recovery obtained in the personal injury action. The lawyer's contingent fee agreement has provided a method for even poor consumers to prosecute complex litigation. This assumption is often not true in cases where defective consumer goods cause only disappointed expectations, not personal injury or property damage. Traditionally, courts have refused to award costs and attorney's fees to the successful plaintiff-buyer and the stakes usually are not high enough to justify the cost of suit. Thus, consumer buyers have had limited practical recourse in cases where their only complaint is that products did not meet the agreed standard of quality.

This problem was addressed in two ways in the Magnuson-Moss Warranty Act.[27] First, the Act provides incentives for suppliers to create informal dispute settlement mechanisms.[28] Where established, these mechanisms offer nonbinding resolution of disputes at no cost to the consumer. Second, the Act includes an effort to change the economics of litigation by providing for recovery of costs and attorney's fees in suits brought under the Act.[29] The Act provides that a consumer who is damaged by breach of an implied warranty may bring suit under the Act for damages and,

> [i]f a consumer finally prevails in any action . . . he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost[s] and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.[30]

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[26]*Id.* at 1203.

[27]Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12 (1976).

[28]*Id.* § 2310(a)(1).

[29]*Id.* § 2310(d)(2).

[30]*Id.*

The only additional requirement for plaintiffs who seek to sue under the Act, and take advantage of this potential for recovery of fees, is that the person obligated under the warranty be "afforded a reasonable opportunity to cure such failure to comply" with the warranty obligation.[31]

The appellate courts have not considered many cases under this provision of the Act. This may be due to the fact that many of these cases are resolved in trial court or by settlement. Indeed, the costs and attorney's fees provision of the Act may provide an incentive for defendant-sellers to settle. However, this year the Indiana Court of Appeals dealt with a case in which there was an award of attorney's fees under the Act. In *Jameson Chemical Co. v. Love*,[32] a buyer purchased some roof coating which was applied on the buyer's various construction projects. The roof coating was defective. The buyer sued and, although no evidence was presented on the number of hours actually worked by the buyer's attorney, the buyer recovered a judgment including an award under Magnuson-Moss of $800 for attorney's fees. In its appeal the seller argued that there was no evidence to support the award of attorney's fees. In response the buyer argued that a trial judge has the power to make an award of attorney's fees without evidence by relying on her knowledge of what a reasonable attorney's fee should be. In resolving this conflict the court of appeals focused on the language of the Act.[33] The Act authorizes an award of attorney's fees "based on actual time expended."[34] The court said that, in the absence of evidence of the amount of time spent by the buyer's lawyer on the case, the trial court was without authority to award attorney's fees.[35] Thus, in its first opinion, the court remanded the case for a hearing on the question of the number of hours worked by the buyer's lawyer.[36] Later, on its own motion, the court reversed its decision.[37] Its first opinion had overlooked the fact that the buyer in question was not a consumer and the product was not a consumer product.[38] Thus the

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[31]*Id.* § 2310(e).

[32]401 N.E.2d 41 (Ind. Ct. App. 1980).

[33]*Id.* at 45.

[34]15 U.S.C. § 2310(d)(2) (1976).

[35]401 N.E.2d at 45.

[36]*Id.* at 48.

[37]It said, "The Court of Appeals has inherent power to correct, on its own motion, an error in a decision and an opinion it has handed down. . . . Accordingly, this court modifies its previous decision and opinion in this cause, which are reported at 410 N.E.2d 41." Jameson Chem. Co. v. Love, 403 N.E.2d 928, 928 (Ind. Ct. App. 1980).

[38]The right to sue under 15 U.S.C. § 2310(d) (1976) is available to consumers who claim defects against suppliers or warrantors of consumer products. Consumer is defined in 15 U.S.C. § 2301(3) (1976) as:

Magnuson-Moss Warranty Act did not apply and could not be the basis of an award of attorney's fees.[39]

The importance of the *Jameson Chemical* case, other than to call attention to the potential for recovery of attorney's fees, is in the commentary of the court on the proof required to support an award of fees. The court stated that some evidence of the number of hours actually expended in representing the plaintiff-buyer must be offered.[40] This conclusion emphasizes the importance of good record keeping. It also suggests that the courts may review the proof of hours in a manner similar to the review of fees in other cases such as bankruptcy.[41] Some of the insights on such things as the concept of billable hours could be borrowed from these other cases. Finally, the buyer should probably introduce some evidence of the reasonable fee per hour to which the plaintiff's lawyer would be entitled.

E. Monetary Damages for Breach of Warranty

In *Coyle Chevrolet Co. v. Carrier*,[42] a case which may have been

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> [A] buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

Consumer product is defined in 15 U.S.C. § 2301(1) (1976) as:

> [A]ny tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

[39]Jameson Chem. Co. v. Love, 403 N.E.2d at 929.

[40]*Id.* at 928-29.

[41]*See In re* First Colonial Corp. of America, 544 F.2d 1291 (5th Cir. 1977); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Both of these cases were remanded to the district courts due to insufficient documentation of the amount of time spent by the attorneys and the type of work involved. 544 F.2d at 1298; 488 F.2d at 717. The judges also failed to justify the awards with findings and reasons. 544 F.2d at 1298; 488 F.2d at 717. These cases listed several factors which should be utilized by judges when awarding the fees, including the time and labor required, the difficulty of the question, and the customary fee. 544 F.2d at 1298-99; 488 F.2d at 717-19. *See also* Rose Pass Mines, Inc. v. Howard, 615 F.2d 1088 (5th Cir. 1980), in which lawyers were required to distinguish between partner and associate time; *In re* City Planners & Developers, Inc., [1980] 6 BANKR. CT. DEC. (CRR) 707 (District of Puerto Rico 1980) requiring the same distinction; *In re* St. Pierre, [1980] 6 BANKR. CT. DEC. (CRR) 607 (District of Rhode Island 1980) prohibiting claims for study of the law which is in the nature of the continuing legal education exercise. Other courts have required lawyers to distinguish between travel time, clerical work, and lawyer work. All of these factors could be brought into play in a suit to recover fees under the Magnuson-Moss Warranty Act.

[42]397 N.E.2d 1283 (Ind. Ct. App. 1979).

more appropriate for the award of attorney's fees under the Magnuson-Moss Warranty Act, but in which the issue was not raised, the court of appeals offered some insight on the meaning of the language of UCC 2-714(2)[43] regarding the subject of the buyer's damages for breach of warranty. That section provides that "[t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."[44]

In *Coyle*, the plaintiff-buyer purchased an automobile which proved to be defective. After several efforts to have the dealer cure the defects, the buyer filed suit. A jury awarded $9,500, which amount was in excess of the purchase price of the car.[45] On appeal the defendant argued that the damage award was excessive. In analyzing the trial judge's decision, the court of appeals concluded that the basic measure of recovery was to be computed under UCC 2-714.[46] The defendant argued that the plaintiff had not proved the value of the automobile as accepted. The only evidence in the record was the testimony of the buyer that the car was worth about $500.[47] On this issue, the court of appeals concluded that the owner of personal property is competent to testify as to its value and that the testimony of the buyer that the car was worth $500 could have been the basis for a decision by the jury that the automobile had a value of $500 at the time of acceptance.[48] The lesson in this case for buyer's lawyers is that it may be advisable for plaintiff-buyers to testify on the issue of the value of the goods at the time of acceptance. The buyer apparently need not show any special knowledge or expertise, but will be competent to testify because he is the owner.

Even if the buyer's estimate of value was admissible and served as the basis for the jury's verdict, the total $9,500 award was still not justified. This award raised the further issue of the scope of consequential and incidental damages which may be recovered under UCC 2-715 in addition to the value of the goods which may be recovered under UCC 2-714. The court stated that sales tax of forty dollars could be recovered as incidental damages resulting from expenses "reasonably incurred in . . . receipt" of the car.[49] Also, the

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[43]IND. CODE § 26-1-2-714(2) (1976).

[44]*Id.*

[45]397 N.E.2d at 1284.

[46]IND. CODE §§ 26-1-2-714 to -715 (1976).

[47]397 N.E.2d at 1287.

[48]*Id.* at 1287-88.

[49]*Id.* at 1286-87.

court stated that the finance charge of $1,581.38, which was paid to finance the purchase of the automobile, could be recovered as consequential damages.[50] These conclusions may be inconsistent with UCC 1-106(1) which provides that the UCC is to "be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . ."[51] The court based its decision on the assumption that the buyer had retained the automobile and was entitled to damages under UCC 2-714. If the goods are accepted and revocation of acceptance is unavailable, the complete measure of recovery is usually provided by the formulation found in UCC 2-714(2)—the difference between the value of the goods as warranted and as accepted. Sales tax is not something which must be recovered over and above the amount produced by that formula in order to achieve the full performance position. Instead, sales tax seems to be the sort of expense which the buyer was willing to contribute in order to bring about the full performance position. This criticism also applies to the amount recovered to compensate the buyer for the finance charge. This, too, was an amount which the buyer had agreed to contribute in order to bring about the full performance position.

To support its conclusion that the buyer should recover the finance charge, the court relied on the recent decision of the Indiana Court of Appeals in *Hudson v. Dave McIntire Chevrolet, Inc.*[52] In that case the court of appeals volunteered in a concluding footnote that interest could be recovered as a form of consequential damages where the seller had reason to know that the buyer needed to borrow money in order to complete the purchase.[53] However, in the *Hudson* case the buyer had revoked acceptance with respect to the auto. Where there has been a rightful revocation of acceptance, the contract is cancelled and the computation of damages begins with the assumption that the buyer has returned the goods, has no obligation to pay the purchase price, and should receive a refund of any amount paid. In this type of case, the finance charge actually paid may be a cost which should be attributed to the breaching seller.[54] However, this reasoning should not be transferred to a case, such as the *Coyle* case, where the buyer kept possession of the

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[50]*Id.*

[51]IND. CODE § 26-1-1-106 (1976).

[52]390 N.E.2d 179 (Ind. Ct. App. 1979).

[53]*Id.* at 184 n.4.

[54]Even if the seller returned the purchase price and the buyer paid off the auto loan, the buyer would still have incurred a portion of the prepaid finance charge. The amount of the finance charge would be computed on the basis of the rule of 78's. IND. CODE § 24-4.5-2-210 (1976).

goods and recovered the full performance position by receiving the value of the goods as promised.

F. Warranty of Habitability—Notice Requirement

Several years ago, in *Theis v. Heuer*,[55] the Indiana Supreme Court held that a seller of a new home makes a warranty of habitability to the buyer.[56] The buyer may sue for breach of warranty of habitability if there are defects in the home which substantially interfere with enjoyment.[57] A few years later, in 1976, the Indiana Supreme Court decided *Barnes v. Mac Brown and Co.*,[58] which extended the warranty protection beyond the first buyer of the home. Under the reasoning of the *Barnes* case a person who bought the home from the original buyer could sue the builder, even though there was no privity of contract.[59] The second buyer could sue the builder as long as the defect was latent, was not discoverable by reasonable inspection, and had manifested itself after the second purchase.[60]

This past year, in *Wagner Construction Co. v. Noonan*,[61] the court of appeals again had occasion to deal with the warranty of habitability, and imposed an important new condition on the buyer's right to sue for breach. In that case, Wagner constructed a house and sold it to Hill in 1973. Five years later Hill sold the house to Noonan who took occupancy on June 26, 1978. On July 4, 1978, a problem arose concerning the septic system which caused raw sewage to back up into the basement. Noonan employed a plumbing contractor who made corrections which temporarily alleviated the problem. In November 1978, Noonan called Wagner and asked about changing some drainage pipes inside the house, but he apparently made no mention of the exact nature of the problem. On January 13, 1979, the same problem arose and the sewage again backed up into the basement. The plumbing contractor was called back to repeat the procedure which had been successful in July 1978. A week later sewage backed up for a third time and again the plumbing contractor was called to repeat the procedure. At this point the plumbing

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[55]264 Ind. 1, 280 N.E.2d 300 (1972), *aff'g* 149 Ind. App. 52, 270 N.E.2d 764 (1971).

[56]264 Ind. at 12, 280 N.E.2d at 306.

[57]*Id.* at 10, 280 N.E.2d at 305 (quoting Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966), wherein the Supreme Court of Idaho stated that "major defects which render the house unfit for habitation, and which are not readily remediable, entitle the buyer to rescission and restitution." *Id.* at 68, 415 P.2d at 711).

[58]264 Ind. 227, 342 N.E.2d 619 (1976).

[59]*Id.* at 229, 342 N.E.2d at 620.

[60]*Id.* at 229, 342 N.E.2d at 621.

[61]403 N.E.2d 1144 (Ind. Ct. App. 1980).

contractor recommended digging into the septic tank as soon as the ground thawed to determine the root of the problem. Again, in April, the problem occurred. At that time, the recommended excavation was performed, the septic tank was opened, and it was discovered that the lead-in pipe extended some three feet into the septic tank. At the trial, Wagner admitted that this condition constituted a defect in the construction and that this was the cause of Noonan's problems. After discovery of the lead-in pipe problem, Noonan did not call Wagner to report the defect or give Wagner an opportunity to repair it. Instead, Noonan sued Wagner on June 8, 1979. The first knowledge Wagner had of the problem was when he received the complaint in June 1979. The small claims court held for Noonan and awarded $632.66 damages.

On appeal, the court first disposed of some general questions concerning the scope of the warranty of habitability. Wagner argued that the warranty should not extend indefinitely and that five years was beyond its period of protection. The court of appeals held that the implied warranty of habitability extends for a reasonable period,[62] and that the small claims court decision extending the warranty to a defect discovered five years after completion of the house was not unreasonable.[63] Also, Wagner argued that the defect did not make the premises "uninhabitable" since Noonan was not forced to vacate the premises. The court of appeals held that the warranty of habitability protects not only against conditions which make the premises uninhabitable but also protects against conditions which substantially impair the owner's use.[64] The presence of the sewage was a sufficient impairment of use to support the trial court's decision.[65]

Finally, and most importantly, Wagner argued that Noonan was obligated to give notice of the defect within a reasonable period of time or his right to recovery would be barred. To advance this argument, Wagner relied on a California Supreme Court case, *Pollard v. Saxe & Yolles Development Co.*,[66] which held that failure to give notice constituted a bar to recovery for breach of warranty of habitability.[67] In the *Pollard* case, the plaintiff purchased an apartment building and took possession on April 1, 1963. The plaintiffs discovered defects at the time they took possession, but did not notify the defendants until January 1967. In concluding that this delay

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[62]*Id.* at 1148.
[63]*Id.*
[64]*Id.*
[65]*Id.*
[66]12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974).
[67]*Id.* at 380, 525 P.2d at 92, 115 Cal. Rptr. at 652.

operated as a bar to recovery, the California Supreme Court took note of the purposes for requiring notice.[68] The court said that notice afforded the defendant an opportunity to repair the defective item, to reduce damages, to avoid defective products in the future, to negotiate settlements, and to protect against stale claims.[69] These are the same concerns which serve as underpinning for the notice requirement of UCC 2-607(3)(a),[70] applicable in sales of goods. Under that section, the buyer must give notice to the seller within a reasonable period of time after discovery of a defect in goods, or recovery is barred. Both the California and Indiana courts referred to UCC 2-607(3)(a) in support of imposing a notice requirement in a warranty of habitability case and, in this discussion, it is assumed that these notice requirements are parallel.

In the *Wagner Construction* case, the Indiana Court of Appeals adopted the notice requirement created by the California Supreme Court.[71] The Indiana court focused on the fact that no notice was given until the time of suit. The contact which Noonan made in November 1978, concerning some possible, but unspecified change in interior piping, when no difficulty with the septic system was being encountered, did not constitute notice which would preserve the right to sue.[72] The court stated that "[n]o particular form of notice is required, but the purchaser must at least inform the builder-vendor of the problem and give him a reasonable opportunity to cure or repair."[73] Because Noonan did not meet the notice requirement he was not entitled to sue, and the trial court's decision in his favor was reversed.[74]

There may be some basis for criticism of the court's reasoning in the *Wagner Construction* case. First, the court said that notice was necessary to give the seller a right to "cure" or repair.[75] If the court was thinking of an analogue to the concept of "cure," defined in UCC 2-508, this emphasis was improper. There is no right to cure defects in goods that have been accepted. "Cure" under UCC 2-508 can be initiated only to block a rejection under UCC 2-601 and cancellation under UCC 2-711. In the *Wagner Construction* case, the buyer had accepted and was keeping the seller's performance (the house). Therefore, the principle of cure found in UCC 2-508 would

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[68] *Id.*
[69] *Id.*
[70] IND. CODE § 26-1-2-607 (1976).
[71] 403 N.E.2d at 1150.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*

not be applicable. Second, under UCC 2-607, the reasonable period during which notice must be given begins when the buyer "discovers or should have discovered any breach." The notice period does not run from the date of original sale. In the *Wagner* case, it seems that the buyer did not realize there was any defect for which the builder could be held responsible until after an investigation of the septic tank in April 1979. It was on this date that the buyer discovered a breach. Therefore, the trial court may have been justified in concluding that the period for notice began in April 1979. Because Wagner received a copy of the complaint in June 1979, the trial court may have concluded that notice was given within a reasonable time.

Even if the buyer had discovered the breach when the backup problem first arose, in July 1978, the trial court's decision could still be defended. Some compassion in measuring the reasonable time period must be shown for consumers who could not be expected to know about notice requirements. Official Comment 4 to UCC 2-607 states that " '[a] reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."[76] Furthermore, the buyer's delay was not in any way comparable to the delay in the *Pollard* case where the buyer knew of the defects when he took possession, but did not give notice until nearly four years later.

The court of appeals may have based it decision on the assumption that the suit could not serve as notice. Such an assumption suggests that there must be some form of notice prior to filing suit. The purpose of such a notice requirement may be to give the seller an opportunity to settle the claim. This presumes that it is more difficult to settle after suit is filed. However, this is a rather formalistic approach. It would require all consumers to give notice prior to filing suit to permit the seller to explore settlement. Furthermore, its application would be especially attenuated where suit was filed, as in the *Wagner Construction* case, in a small claims court with rather informal procedures and lower costs for initiating suit. These lower costs and informal procedures may form less of an obstacle to settlement than a suit in a court of general jurisdiction.

Finally, the court of appeals concluded that Noonan's call to Wagner in November 1978, did not constitute notice because it did not specifically identify defects.[77] This suggests a more rigorous re-

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[76]U.C.C. § 2-607, Official Comment 4.

[77]403 N.E.2d at 1150.

quirement than is imposed by UCC 2-607. The notice required by UCC 2-607 need not specify the exact nature of a defect. Official Comment 4 to UCC 2-607 states that "[t]he content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched." The trial court could have found that the call of November 1978, informed the seller that the transaction was troublesome.

G. Liability of Agents on Checks

Shareholders and officers of closely held corporations and representatives in other small businesses sometimes execute negotiable instruments without making clear in what capacity they are signing. They may intend to create only corporate liability; they may intend only personal liability; or they may intend corporate liability with personal liability as a surety or accomodation party. The resulting uncertainty as to the liability of the signer is of special concern where the contracts are made on negotiable instruments. To address this problem, UCC 3-403[78] provides some strict operating rules on the subject. To begin, there are obvious extreme cases resolved as a matter of law under UCC 3-403(2)(a).[79] If the signer neither names the person represented nor shows the representative capacity, the signer is personally obligated. On the other hand, if the signer both names the person represented and indicates a representative capacity, UCC 3-403(3) provides that the signer is not liable and has made a contract on the instrument only on behalf of the principal.[80] In between these extreme cases there are some signatures which may create ambiguities. If the instrument names the person represented, but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented, but does show the representative signed in a representative capacity, UCC 3-403(2)(b) causes the analysis to be governed by the identity of the parties in the litigation.[81] It provides that an authorized representative who signs his own name to an instrument,

> [e]xcept as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representa-

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[78]IND. CODE § 26-1-3-403 (1976).

[79]*Id.* § 26-1-3-403(2)(a). Courts have been generous in finding some indication of representative capacity to avoid assessing personal liability as a matter of law. *See*, Weather-Rite Inc. v. Southdale Pro-Bowl Inc., 301 Minn. 346, 222 N.W.2d 789 (1974).

[80]*Id.* § 26-1-3-403(3).

[81]*Id.* § 26-1-3-403(2)(b).

> tive signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.[82]

Thus, if the suit is between the immediate parties to the instrument, such as the maker and payee of a note, the dispute can be resolved in the same manner as it would be in the context of a simple contract.[83] The agent may show, by any relevant evidence, that her signature was made in a representative capacity and that the parties did not intend her to have personal responsibility. However, if the suit is not between the immediate parties, but is between a subsequent holder and the agent, the special needs of negotiable paper are brought into focus and the ambiguity is resolved against the agent.

With regard to corporate checks, UCC 3-403(2)(b) may present special dangers of accidental liability for agents of closely held corporations. If a check bears the printed name of the corporation, but does not have an indication under the drawer's signature line that the drawer is signing in a representative capacity, the liability of the agent on the check may be governed by UCC 3-403(2)(b). This check would be an instrument which named the principal but did not indicate a representative capacity. If the person suing on the check is the payee, then, of course, even under UCC 3-403(2)(b), the agent would be able to show that the parties intended her signature to be in a representative capacity. However, if the suit on the check is brought by someone other than the payee, that is, someone other than one of the immediate parties to the instrument, the agent may not be able to show by other evidence that the signature was made in a representative capacity. Under UCC 3-403(2)(b) she may be personally liable as a matter of law.

A case involving just this type of check was presented to the court of appeals last year in *Highfield v. Lang*.[84] Fortunately for the agent, the suit was brought by the payee and was thus between the immediate parties. The court permitted the representative of the closely held corporation to introduce evidence of his representative capacity. The representative showed that the payee was an employee of the corporation who knew that the representative was Vice-President and was signing in a representative capacity.[85] The trial court held for the agent and the court of appeals affirmed.[86]

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[82] *Id.*
[83] *Id.*
[84] 394 N.E.2d 204 (Ind. Ct. App. 1979).
[85] *Id.* at 206.
[86] *Id.*

However, the important lesson of the *Highfield* case is not in the holding, it is in the attention it calls to the risk that someone other than the payee could bring suit against the agent on the check. For example, the suit could have been brought by a collecting bank. In that case, the agent may not have been able to prove his representative capacity and may have been personally liable as a matter of law. The lesson for lawyers is to make certain that company checks have some indication of representative capacity near the line for the drawer's signature.

H. Customer's Duty to Examine Bank Statements

UCC 4-406(1) provides a standard of care for bank customers with respect to bank statements. When a bank sends "a statement of account accompanied by items paid in good faith . . . the customer must exercise reasonable care and promptness [in examining] the statement and items to discover . . . unauthorized signature[s] or alteration[s]."[87] Furthermore, the customer must notify the bank promptly after a forgery or alteration is discovered. A customer's failure to comply with these duties with respect to any item may preclude the customer from asserting that the item was not properly payable in the following circumstances.[88] If a customer was the victim of forgery or alteration by the same wrongdoer on a series of items which the bank paid and forwarded to the customer at periodic intervals, the customer may be precluded from asserting the forgeries or alterations that took place after the customer had the statement for a reasonable period not exceeding fourteen calendar days and before the bank received notice from the customer of this forgery or alteration.[89] However, if the bank was negligent in paying the item the customer's negligence would be cancelled out; the customer would be able to claim that the checks bearing forgeries or alterations were not properly payable and could still insist on recredit to her account.[90]

In *Indiana National Corp. v. Faco, Inc.*[91] the Indiana Court of Appeals had occasion to deal with UCC 4-406 in a situation which presented a very common fact pattern. In that case, there was a dishonest employee of a closely held family corporation (Faco) who was responsible for its books. The employee repeatedly forged the signature of a corporate officer as drawer on Faco checks, made the

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[87]IND. CODE § 26-1-4-406(1) (1976).
[88]U.C.C. § 4-406(2); IND. CODE § 26-1-4-406(2) (1976).
[89]U.C.C. § 4-406(2); IND. CODE § 26-1-4-406(2) (1976).
[90]U.C.C. § 4-406(3); IND. CODE § 26-1-4-406(3) (1976).
[91]400 N.E.2d 202 (Ind. Ct. App. 1980).

checks payable to himself or to his daughter and thus embezzled $51,809.09 from Faco. The checks were all paid by the payor bank and were forwarded to Faco along with monthly statements. Of course, since the forger was the bookkeeper, the forgeries and fraud did not come to the attention of the officers of Faco and were not discovered until the scheme had operated for two years. At that time, the corporation sued the payor bank alleging that these forged checks were not properly payable. The trial court entered a judgment in favor of Faco for the entire amount.[92]

On appeal, the bank raised some interesting questions with respect to the customer's negligence under section 4-406. First, the bank urged that the failure of the officers of Faco to discover the fraud committed by their employee was a failure to exercise reasonable care and promptness in examining statements under UCC 4-406(1). The court of appeals agreed.[93] The court noted that no audit was performed and none of Faco's officers took the time to inspect the items or the statements provided by the bank. Thus, Faco had been negligent, presumably as a matter of law. This approach differs from the approach taken by other courts. One court held that the test of negligence is whether the entity was negligent in selecting the employee on the basis of the facts known to it at the time.[94] Other courts have held the customer is chargeable with knowledge of such facts as an honest agent would acquire from a prudent examination of the statement.[95] The formulation used by the Indiana Court of Appeals is close to this latter approach and seems to be the better reasoned position.

Once the customer's negligence is established the bank can avoid liability for these forgeries unless the bank was negligent. In the *Faco* case the court of appeals concluded that there was evidence that could support a decision that the bank was negligent and could therefore support the trial court's judgment for the customer.[96] First, Faco had presented evidence that three unsigned checks drawn on the Faco account had been paid. Further, an employee of the bank, who was to examine the checks for unauthorized signatures, testified that these three checks should not have been paid. Finally, Faco presented evidence of the extremely heavy workload

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[92]*Id.* at 203.

[93]*Id.* at 204-05.

[94]Jackson v. First Nat'l Bank of Memphis, Inc., 55 Tenn. App. 545, 403 S.W.2d 109 (1966).

[95]Exchange Bank and Trust Co. v. Kidwell Constr. Co., 463 S.W.2d 465 (1971). *See* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 16-7, at 630 (2d ed. 1980).

[96]400 N.E.2d at 205.

of bank employees responsible for examining checks and that the bank was unable to produce copies of thirty of the forged checks which had been sent to Faco.[97] This negligence cancelled out the customer's negligence and caused the bank to be responsible for the checks because they were not properly payable.

However, despite the bank's negligence, there was one final step in the analysis of this problem under UCC 4-406. UCC 4-406(4)[98] creates a condition precedent to recovery by the customer. It provides that

> [w]ithout regard to care or lack of care of either the customer or the bank a customer who does not within one (1) year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature or any alteration . . . is precluded from asserting against the bank such unauthorized signature . . . .[99]

The purpose of this provision is to encourage promptness and good business practices on the part of bank customers and to relieve banks of any liability to their customers who fail to follow those practices. The court noted that Faco had reported the forgeries to the bank in August 1975.[100] Under UCC 4-406(4), the bank was responsible only for those forged checks which had been received by Faco within one year prior to the date of notice. In other words, those checks which were sent to the customer before August 1974, were the responsibility of the customer, not the bank. Applying this provision, the court affirmed the trial court's judgment for Faco, but instructed the trial court to deduct the sum of the forged checks which were sent to the customer prior to August 1974.[101]

I. Check Forgery

The court of appeals last year decided two cases on the subject of check forgery. One case, *Insurance Co. of North America v. Purdue National Bank*,[102] dealt with a forgery of an endorsement; the other case, *Payroll Check Cashing v. New Palestine Bank*,[103] dealt with a forgery of the drawer's signature. In both cases, the court of appeals addressed interesting and important forgery issues.

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[97] *Id.*

[98] IND. CODE § 26-1-4-406(4) (1976).

[99] *Id.*

[100] 400 N.E.2d at 205.

[101] *Id.* at 206.

[102] 401 N.E.2d 708 (Ind. Ct. App. 1980).

[103] 401 N.E.2d 752 (Ind. Ct. App. 1980).

1. Drawer Forgery.—In the *Payroll Check Cashing* case,[104] checks on which the drawer's signature was forged were cashed at the Payroll Check Cashing Service (Payroll). Payroll forwarded them through regular banking channels and they were paid by the drawee, New Palestine Bank (payor bank). After the cancelled checks and monthly statement were sent to the drawer named on the checks, the drawer notified the payor bank of the forgeries. The payor bank recredited the drawer's account and sued Payroll. The trial court entered a judgment in favor of the payor bank for the amount of the checks.[105]

Any analysis of the payor bank's right to sue for payment made on checks bearing drawer forgeries must take account of the finality principle codified in UCC 3-418.[106] That section provides in part that "payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment."[107] This principle is built on the assumption that once an instrument is finally paid, the payment should not be recovered unless there are special circumstances. This follows because there are usually numerous transactions firmed up by the payment of an instrument and there may be decisions in various subordinate transactions made in reliance on payment. To reopen those transactions could cause considerable dislocation.[108]

Among other things, this finality principle operates to prevent a payor bank from suing to recover money paid out on a check bearing a forged drawer's signature.[109] However, this result should not engender excessive sympathy for payor banks. A payor bank should discover the forgery of the drawer's signature when the check is presented for payment. It should have the drawer's signature on file and should be able to verify the signature on the check. If it does not discover the forgery, there is little to commend permitting the payor bank to shift the loss to parties who have handled the check in the collection process.[110]

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[104]*Id.*

[105]*Id.* at 754.

[106]IND. CODE § 26-1-3-418 (1976).

[107]*Id.*

[108]Official Comment 1 to U.C.C. § 3-418 provides that "it is highly desirable to end the transaction on an instrument when it is paid rather than reopen and upset a series of commercial transactions at a later date when the forgery is discovered."

[109]Official Comment 1 to U.C.C. § 3-418 provides that the text of § 3-418 "follows the rule of Price v. Neal, 3 Burr. 1354 (1762), under which a drawee who accepts or pays an instrument on which the signature of the drawer is forged is bound on his acceptance and cannot recover back his payments."

[110]Official Comment 1 to U.C.C. § 3-418 provides that "[t]he traditional justification for the result is that the drawee is in a superior position to detect a forgery because he has the maker's signature and is expected to know and compare it . . . ."

Despite the finality principle, the payor bank may still be able to recover its payment if it can show that there are special circumstances which constitute breach of a presentment warranty.[111] Presentment warranties liability constitute an exception to the finality principle.[112] These presentment warranties include a warranty that: (1) The presenting party has good title to the item, (2) the presenting party has no knowledge that the signature of the maker or drawer is unauthorized, and (3) the item has not been materially altered.[113] Unfortunately for payor banks, in drawer forgery cases there is usually no breach of presentment warranty. The warranty of good title is not breached simply by virtue of the forgery of the drawer's signature.[114] Since the forgery operates as the signature of the forger, the check is simply the forger's check bearing the forger's order and drawer's contract. Thus, the presenting party has good title.[115] The most likely way for payor banks to establish a presentment warranty breach is to show that the person presenting the check had knowledge of the drawer's forgery.[116]

In the *Payroll Check Cashing* case, the trial court's decision in favor of the payor bank had to be affirmed by the appellate court if there was any basis for the trial court's decision. The court of appeals noted that there was no evidence that Payroll had breached a presentment warranty.[117] Therefore, the only basis for the trial court's decision was the assumption that Payroll was not entitled to the benefit of the finality principle. UCC 3-418 states that the finality principle operates only in favor of two groups: (1) Persons who have changed position in reliance on payment, and (2) holders in due course. There was no evidence that Payroll had changed position in reliance on payment. Thus, Payroll had to establish that it was a holder in due course. In general, the burden of proof is on the person claiming the rights of a holder in due course. UCC 3-307(3) pro-

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[111]U.C.C. § 3-417(1); IND. CODE § 26-1-3-417(1) (1976). There is a special set of warranty provisions that apply to transfer and presentment in the context of bank collection. These warranties are found in U.C.C. § 4-207(1); IND. CODE § 26-1-4-207(1) (1976).

[112]U.C.C. § 3-418 states that "except for liability for breach of warranty of presentment . . . payment or acceptance . . . is final . . . ."

[113]IND. CODE § 26-1-3-417(1) (1976).

[114]Whaley, *Forged Instruments and the UCC's "Holder,"* 6 IND. L. REV. 45, 61-62 (1972).

[115]U.C.C. § 3-404 provides that an unauthorized signature "operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value." IND. CODE § 26-1-3-404(1) (1976). The instrument is simply the forger's check and there are no title questions.

[116]U.C.C. § 3-417(1)(b) provides that the party making the presentment warrants "he has no knowledge that the signature of the maker or drawer is unauthorized." IND. CODE § 26-1-3-417(1)(b) (1976).

[117]401 N.E.2d at 756-57.

vides that "[a]fter it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course."[118] The court of appeals concluded that neither the general principle with regard to the burden of proof, nor this language was applicable to this case.[119] The court concluded that this language applied to cases where a holder in due course was attempting to sue on an instrument with respect to which there were defenses.[120] In the *Payroll Check Cashing* case, the payor bank brought suit against an intermediate holder who needed the protection of the finality principle. The court held that on this issue the burden of proof was on the payor bank in its effort to establish that Payroll was not a holder in due course.[121] Since there was no evidence in the trial record to show that Payroll was not a holder in due course, Payroll was entitled to the benefit of the finality principle. As a result, the trial court's decision in favor of the payor bank was erroneous and it was reversed with instructions to enter judgment for Payroll.

Some courts and authors have argued that it is not necessary to examine UCC 3-418 where the payment has been made by a bank on a check bearing a drawer forgery.[122] The argument begins with UCC 4-102(1) which provides that "[i]n the event of conflict the provisions of this Article govern those of Article 3 . . . ."[123] UCC 4-213(1) provides that "[u]pon a final payment . . . the payor bank shall be accountable for the amount of the item."[124] This language suggests a broader final payment principle imposed by UCC Article 4 on banks which make payment on instruments. It is broader in the sense that it operates in favor of all parties who act in good faith, not only in favor of holders in due course and persons who change position in reliance on payment. The fact that the Indiana Court of Appeals analyzed the *Payroll Check Cashing* case under UCC 3-418 suggests that it has rejected this argument and has concluded that the only finality principle is found in UCC 3-418.

2. Forged Indorsements.—In *Insurance Co. of North America v. Purdue National Bank*,[125] the court of appeals addressed the ques-

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[118]IND. CODE § 26-1-3-307(3) (1976).
[119]401 N.E.2d at 758.
[120]*Id.*
[121]*Id.*
[122]*See* J. WHITE & R. SUMMERS *supra* note 95, § 16-2, at 613-17.
[123]IND. CODE § 26-1-4-102(1) (1976).
[124]*Id.* § 26-1-4-213(1).
[125]401 N.E.2d 708 (Ind. Ct. App. 1980).

tion of whether the drawer could sue a depositary bank[126] which presented a check bearing a forged endorsement. In that case Freyman forged a power of attorney for Helen Creech who had a savings account at the Lafayette Savings Bank (Savings Bank). Using this forged power of attorney, Freyman made a withdrawal of $8,000 from Helen Creech's savings account. The funds withdrawn were paid out by way of a check drawn by Savings Bank on the Lafayette National Bank (National) payable to Helen Creech. Although Savings Bank had a signature card bearing Helen Creech's signature, the forgery of the power of attorney was not discovered. There was no evidence that the signatures were compared. Freyman forged Helen Creech's endorsement on the back of the check and deposited it in his account at the Purdue National Bank of Lafayette (Purdue). It was presented through regular banking channels and paid. In a very similar transaction, Freyman went to Savings Bank with a notice of administration for the estate of James Paul Davis, another depositor at Savings Bank. On the basis of his representation that he was attorney for the estate, Freyman withdrew $1,000 from Davis' savings account and a check in the amount of $1,000 was drawn by Savings Bank on National, payable to Ruth A. Braun, the executrix of the Davis estate. Freyman forged Braun's endorsement on the check and deposited it in his account at Purdue. It was presented for payment through regular banking channels and paid by National. Thereafter, Savings Bank discovered the forgeries on the two checks and the fraud which had been perpetrated against the accounts of its two customers. It recredited the accounts of Creech and Davis in the amount of the respective withdrawals and demanded reimbursement from the depositary bank, Purdue, which refused. The Insurance Company of North America paid Savings Bank under a policy of insurance against loss from forgery and filed suit as subrogee of the claim against Purdue. The case was tried on this stipulation of facts and the trial court entered a judgment for Purdue.[127]

In deciding the insurance company's appeal the court of appeals first considered whether it was appropriate to permit a suit by the drawer of a check bearing a forged endorsement against the depositary bank. It is clear that, absent negligence, the drawer has a claim against the payor bank,[128] which in turn could sue the collec-

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[126]A depositary bank is "the first bank to which an item is transferred for collection . . . ." IND. CODE § 26-1-4-105(a) (1976). The question raised in the case also applies to all collecting banks which are any banks handling items for collection. *Id.* § 26-1-4-105(d).

[127]401 N.E.2d at 710.

[128]A check which does not bear the endorsement of the payee is not properly payable. The payor bank may charge the customer's account only in the case of a properly

ting bank,[129] but it is a direct suit by the drawer with which we are concerned. Several theories have been advanced for this type of direct suit: (1) The collecting bank may be liable to the drawer for conversion;[130] (2) the drawer may be a third party beneficiary of the presentment warranty of good title made by collecting banks;[131] (3) the drawer is an assignee of the drawee's right to sue on the presentment warranty of good title;[132] or (4) the drawer is an "other payor" within the meaning of UCC 4-207(1), is thus a person to whom presentment warranties are made, and can sue collecting banks on the presentment warranty of good title.[133] These theories have produced mixed results in the courts. At the center of the controversy seems to be a problem of deciding which parties should litigate questions concerning the drawer's negligence. To demonstrate this proposition, assume that the drawer had just discovered the forgeries and was contemplating how to recoup its losses. The most likely defendant would be the payor bank which had paid the forged checks improperly. The drawer could demand that payor bank recredit her account, but in response to this demand the payor bank could raise various issues of negligence. The drawer may have been guilty of negligence which substantially contributed to the forgery and may thus be precluded from asserting it.[134] Similarly, the drawer may have failed to exercise reasonable care in examining her statement and may be precluded from asserting later forgeries by the same wrongdoer.[135] Finally, the drawer may have failed to give notice within three years from the time the forgery was discovered and thus would be precluded from asserting the forgery against the payor bank.[136] The proof of these various types of negligence would be more readily available to the payor

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payable item. *See* U.C.C. § 4-401(1); IND. CODE § 26-1-4-401(1) (1976). The customer has a claim for any improper charge to an account.

[129]The payor bank can sue the collecting bank for breach of the presentment warranty of good title. 401 N.E.2d at 711-14. A check as to which there has been a forgery of the payee's signature is still owned by the payee, and persons handling the check do not have good title. For a discussion of the effect of a forgery on the rights of the payee and subsequent holders, see J. WHITE & R. SUMMERS *supra* note 95, § 15-2.

[130]This theory has been rejected because the drawer does not have a property interest in the check which can be the subject of a conversion. The property in the check is owned by the payee. *See* Allied Concord Fin. Corp. v. Bank of America Nat'l Trust & Sav. Ass'n, 275 Cal. App. 2d 1, 80 Cal. Rptr. 622 (1969).

[131]*Id.*

[132]Commonwealth v. National Bank & Trust Co., 46 Pa. D. & C.2d 141 (1968).

[133]Insurance Co. of North America v. Atlas Supply Co., 121 Ga. App. 1, 172 S.E.2d 632 (1970).

[134]U.C.C. § 3-406; IND. CODE § 26-1-3-406 (1976).

[135]U.C.C. § 4-406; IND. CODE § 26-1-4-406(1), (2) (1976).

[136]U.C.C. § 4-406(4); IND. CODE § 26-1-4-406(4) (1976).

bank. It would probably be the only bank which would have knowledge of the drawer's negligence or sloppy practices or the customer's failure to exercise reasonable care in examining statements. Because these defenses can be best raised by the payor bank, the drawer should be required to proceed against the payor bank and not be entitled to sue directly against the collecting bank which would not be as well prepared to raise negligence defenses. UCC 4-406(5) seems to support this argument. It provides that, "[i]f . . . a payor bank has a valid defense against a claim of a customer . . . and . . . fails upon request to assert the defense the bank may not assert against any collecting bank . . . a claim based upon the unauthorized signature . . . giving rise to the customer's claim."[137] This is the position advanced by White and Summers, the authors of the most popular treatise on the subject.[138]

The Indiana Court of Appeals, however, was less impressed with these concerns than with a recent decision of the California Supreme Court, *Sun' N Sand, Inc. v. United California Bank.*[139] In that case the court focused on the language of UCC 4-207(1) in permitting the drawer's suit against the collecting bank. That section provides that a presentment warranty extends to "the payor bank *or other payor* who in good faith pays or accepts the item."[140] The court in *Sun' N Sand*, concluded that the drawer of a check qualifies as an "*other payor* who . . . pays."[141] This interpretation is supported by the internal logic of UCC 4-207(1). Some presentment warranties are specifically not made to a drawer. For example, the presenting party warrants that she has no knowledge that the signature of the drawer is unauthorized. However, this warranty is not made by a collecting bank which is a holder in due course acting in good faith, "to a drawer with respect to the drawer's own signature."[142] By specifically excluding drawers from this warranty protection, the drafters created a negative implication that other warranties are made for the benefit of the drawer. The Indiana Court of Appeals adopted this reasoning in *Insurance Co. of North America.*[143] In addition, the court concluded that some weight had to be given to avoiding the circuity of action created by requiring the drawer to look first to the payor bank.[144]

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[137]IND. CODE § 26-1-4-406(5) (1976).

[138]J. WHITE & R. SUMMERS *supra* note 95, § 15-5, at 602.

[139]21 Cal. 3d 671, 582 P.2d 920, 148 Cal. Rptr. 329 (1978).

[140]*Id.* at 682, 582 P.2d at 928, 148 Cal. Rptr. at 337 (emphasis added).

[141]U.C.C. § 4-207(1); IND. CODE § 26-1-4-207(1) (1976) (emphasis added).

[142]U.C.C. § 4-207(1)(b)(ii); IND. CODE § 26-1-4-207(1)(b)(ii) (1976).

[143]401 N.E.2d at 714.

[144]*Id.*

Even though the drawer may bring a direct action against a collecting bank on the presentment warranty of good title, the collecting bank may raise any defense which could be raised by the payor bank against its customer.[145] Thus, if the drawer were guilty of some negligence which substantially contributed to the forgery or if there were some other basis for the payor bank to refuse to recredit the drawer's account, the collecting bank would be able to raise the defense. In *Insurance Co. of North America*, there was evidence that Savings Bank's negligence substantially contributed to the forgeries. Savings Bank had allowed withdrawals from the savings accounts of its customers on the fraudulent assertions of the forger that he had authority to make the withdrawals. With respect to the first check, the forger used a Power of Attorney bearing a forged signature which Savings Bank did not discover even though the genuine signature was in its files. Instead, Savings Bank simply issued a check payable to its customer, Helen Creech, and gave it directly to the forger. As for the other check, there was no written authorization for withdrawal from the savings account. The forger presented a Notice of Administration which identified him as attorney for the estate. Savings Bank made no attempt to verify his authority. On the basis of these facts the trial court could have found that the drawer failed to use ordinary care in dealing with the accounts of its customers and in delivering these checks to the forger. Further, the negligence was a substantial factor contributing to the unauthorized indorsements. Thus, the trial court was correct in holding that the collecting bank was not liable to the drawer, and its judgment was affirmed.[146]

J. Truth in Lending

1. Truth in Lending Simplification.—On March 31, 1980, President Carter signed into law the Depositary Institutions Deregulation and Monetary Control Act of 1980.[147] A major part of this Act is Title VI, devoted to Truth in Lending Simplification—a subject which has been under discussion in Congress for the past several years.[148] Title VI on Truth in Lending Simplification (TILS)[149] is quite

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[145]U.C.C. § 4-406(5); IND. CODE § 26-1-4-406(5) (1976).

[146]401 N.E.2d at 715.

[147]Pub. L. No. 96-221, 94 Stat. 132 (codified in titles 12, 15, 22, and 42 U.S.C. (1976)).

[148]S. 2802, 95th Cong., 2d Sess., 124 CONG. REC. 4498, 7226 (1978) (incorporating S. 1312, 95th Cong., 1st Sess., 124 CONG. REC. 11332 (1977); S. 1501, 95th Cong., 1st Sess., 123 CONG. REC. 14536 (1977); S. 1653, 95th Cong., 1st Sess., 123 CONG. REC. 18200 (1977); S. 1846, 95th Cong., 1st Sess., 123 CONG. REC. 22747, 22800 (1977)).

[149]Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, 94 Stat. 168 (1980) (amending 15 U.S.C. §§ 1601-92 (1976)).

complex, and an exhaustive discussion of its provisions is beyond the scope of this survey. However, in the few paragraphs that follow, an attempt is made to review some of its highlights.

a. Definitions.—Some key definitions were modified by TILS. First, the term "creditor" was redefined to eliminate some persons from its scope. To understand this modification it may be useful to consider two illustrations. First, assume that Acme Health Spa sold memberships for $500 payable in twenty-four monthly installments. On the date each membership contract was created, Acme assigned the contract to the Universal Finance Company at a substantial discount. Second, assume that Sally Broker was a real estate agent who worked with consumer house buyers. After finding houses, Sally helped buyers obtain financing by participating in the preparation of documents required in connection with mortgage loans. Under Truth in Lending (TIL),[150] the possibility exists that both Universal and Sally could be creditors and incur liability for failure to make proper disclosures because they either extend or arrange for credit.[151] This potential has been eliminated by TILS. The new definition of creditor refers only to a person who "is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence on indebtedness."[152] Under the new law assignees and arrangers will not be creditors unless they are named on the face of the evidence of indebtedness.

TILS also modified the definition of "open-end credit." Under TIL some credit sellers were avoiding disclosure requirements by casting their transactions in the form of open-end credit extensions. Creditors did not actually contemplate that the consumer would engage in a series of transactions, and, for the most part, these arrangements amounted to a sham designed to avoid making the more significant disclosures required in closed-end transactions.[153] Open-end credit is now defined to mean "a plan under which the creditor reasonably contemplates repeated transactions."[154] Under this language a creditor will be able to treat an extension as open-end only if she contemplates repeated transactions.

b. Scope of TIL.—TILS brings about a fundamental change in the scope of TIL. With reference to credit transactions, TIL defines

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[150]15 U.S.C. § 1601-91 (1976).

[151]*See, e.g.*, Glaire v. LaLanne Paris Health Spa, Inc., 528 P.2d 357 (Cal. 1974); Regulation Z, 12 C.F.R. § 226.2(s) and (L) (1980).

[152]Pub. L. No. 96-221, § 602(a), 94 Stat. 168 (1980) (amending 15 U.S.C. § 1602(f) (1976)).

[153]*See* S. Rep. No. 73, 96th Cong., 2d Sess. 10 (1979) *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 834, 885.

[154]Pub. L. No. 96-221, § 604, 94 Stat. 169 (1980) (amending 15 U.S.C. § 1602(i) (1976)).

the adjective "consumer" to include extensions for personal, family, household, or agricultural purposes.[155] As a result, agricultural credit extended to a natural person is consumer credit under TIL and, among other things, disclosures are required. TILS changes the definition of the word "consumer" in TIL to cover only extensions for personal, family or household purposes. Now exempt from TIL are "[c]redit transactions involving extensions of credit primarily for business, commercial, or *agricultural purposes*."[156] This new definition and exclusion are in furtherance of the premise that agricultural credit is essentially commercial in nature and that TIL protections are unnecessary.[157] Although in some states this change in scope of TIL will eliminate complexity, it may cause significant headaches for Indiana creditors who extend credit for agricultural purposes because the disclosure requirements of the Indiana Uniform Consumer Credit Code may continue to apply.[158]

The scope of TIL has been expanded to include one increasingly important transaction—extension of credit secured by an interest in a mobile home. Again, this change can be understood best by way of an illustration. Assume that a consumer borrows more than $25,000. Currently this extension is not covered by TIL. The assumption is that customers who have the capacity to borrow large amounts are not in need of disclosures. However, where the consumer credit is secured by an interest in real property, this assumption may not operate. The most important credit transaction for many consumers is the purchase of a home through a loan secured by a mortgage. Borrowers in this context are assumed to need TIL protection. As a result, TIL applies to all extensions of consumer credit, regardless of the amount, in connection with which a security interest in real property is or will be retained or acquired.[159] However, credit extended for the purpose of acquiring a mobile home is not subject to this exception because no security interest in real property is acquired. An extension of credit in excess of $25,000 secured by a mobile home is not covered by TIL because it falls within the gen-

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[155]15 U.S.C. § 1602(h) (1976).

[156]Pub. L. No. 96-221, § 603(c)(1), 94 Stat. 169 (1980) (amending 15 U.S.C. § 1603(1) (1976)) (emphasis added).

[157]*See* note 153 *supra.*

[158]IND. CODE § 24-4.5-2-301(3) (1976) provides that "information which would otherwise be required pursuant to the Federal Consumer Credit Protection Act is sufficient even though the transaction is one of a class of credit transactions exempted from that Act pursuant to regulation of the Board of Governors of the Federal Reserve System." Generally, it is believed that this language will not exempt agricultural credit from state UCCC requirements for disclosure. *See* Miller, *Living with Both the UCCC and Regulation Z*, 26 OKLA. L. REV. 1 (1973).

[159]15 U.S.C. § 1603(3) (1976).

eral exclusion of large credit extensions. TILS changes this result and gives parallel treatment to transactions secured by mobile homes or real property. Under TILS, credit transactions in which the amount financed exceeds $25,000 are excluded "other than those in which a security interest is or will be acquired in real property, or in personal property used or expected to be used as the principal dwelling of the consumer."[160]

c. Model Forms.—TILS provides that "[t]he board [of Governors of the Federal Reserve System] shall publish model disclosure forms and clauses for common transactions to facilitate compliance with the disclosure requirements."[161] Other than numerical disclosures, if creditors use forms published by the Board, they shall be deemed to be in compliance with TIL disclosure requirements.[162] This should aid small creditors who have had difficulty in drafting or adapting their own forms. The model forms will be of less significance to major creditors who, because of the complexity of their transactions, may not be able to adapt the model disclosure forms as readily. Also, large creditors may have a sufficient volume of transactions to justify the expense of drafting complying forms suited to specialized transactions.

d. Effective dates for regulations.—TILS also provides that new regulations, amendments, or interpretations which require any disclosure differing from the disclosure previously required "shall have an effective date of that October 1 which follows by at least six months the date of promulgation."[163] The likely effect of this provision will be to cause most changes to take effect on October first of any given year with at least six months warning to give creditors time to prepare. This will aid creditors in changing their forms and gearing the purchase of forms to these effective dates. However, TILS provides that a creditor may comply with a new regulation prior to the October first effective date.[164]

e. Disclosures.—TILS brings about major changes in the matters which must be disclosed. First, under TILS the key disclosures in other than open-end transactions must "be conspicuously segregated from all other terms, data, or information provided in connection with the transaction including any computations or itemization."[165]

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[160]Pub. L. No. 96-221, § 603(c)(2), 94 Stat. 169 (1980) (amending 15 U.S.C. § 1603(3) (1976)).

[161]Pub. L. No. 96-221, § 605, 94 Stat. 170 (1980) (amending 15 U.S.C. § 1605 (1976)).

[162]*Id.*

[163]*Id.*

[164]*Id.*

[165]Pub. L. No. 96-221, § 614(b), 94 Stat. 179 (1980) (amending 15 U.S.C. § 1638(b) (1976)).

Second, some disclosures have been simplified.[166] For example, TIL requires disclosure of "[a] description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit."[167] Under TILS, a creditor need only disclose a statement that a security interest has been taken in property purchased as part of the transaction or other property identified by item or type.[168] Similarly, under TIL the creditor must disclose "[t]he amount or method of computing any default, delinquency, or similar charges payable in the event of late payments."[169] TILS provides that the creditor must disclose "[a] statement that the consumer should refer to the appropriate contract document for any information such document provides about nonpayment, default, the right to accelerate the maturity of the debt, and prepayment rebates and penalties."[170] This should reduce litigation over whether such things as acceleration clauses constitute default charges which must be disclosed.[171] Third, TIL requires an itemization of disclosures such as the amount financed and the finance charge.[172] TILS eliminates this requirement of itemization and provides, for example, that "[i]n conjunction with the disclosure of the amount financed, a creditor shall provide a statement of the consumer's right to obtain, upon a written request, a written itemization of the amount financed."[173] Fourth, there are some interesting new disclosures required in the context of consumer real property mortgaged transactions. Under TIL the creditor is required to disclose the finance charge and the total of payments, except in cases where the credit is extended in a sale of a dwelling or a loan secured by a first lien on a dwelling.[174] This exception to the disclosure requirement was built on the assumption that, in these transactions, the total of payments and finance charge could be so forbidding that consumers would be frightened and would withdraw from home purchase transactions. This concern seemed doubtful and had been refuted by experience in some states where

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[166]*See generally,* S. Rep. No. 73, 96th Cong., 1st Sess. 3.

[167]15 U.S.C. § 1638(a)(10) (1976).

[168]Pub. L. No. 96-221, § 614(a)(9), 94 Stat. 179 (1980) (amending 15 U.S.C. § 1638 (1976)).

[169]Regulation Z, 12 C.F.R. § 226.8(b)(4) (1980).

[170]Pub. L. No. 96-221, § 614(a)(12), 94 Stat. 179 (1980) (amending 15 U.S.C. § 1638 (1976)).

[171]*See* notes 176-80 *infra* and accompanying text.

[172]Regulation Z, 12 C.F.R. § 226.8(c)(4) (1980) (amount financed); *id.* § 226.8(c)(8) (finance charge); *id.* § 226.8(d)(1) (amount financed); *id.* § 226.8(d)(3) (finance charge).

[173]Pub. L. No. 96-221, § 614(a)(2)(B), 94 Stat. 178 (1980) (amending 15 U.S.C. § 1638(a)).

[174]Regulation Z, 12 C.F.R. § 226.8(c)(8) (1980); *id.* § 226.8(d)(3).

disclosures were required by state law.[175] TILS requires disclosure of the total finance charge and the total of payments in all transactions. Finally, TILS requires disclosure "[i]n any residential mortgage transaction, [of] a statement indicating whether a subsequent purchaser or assignee of the consumer may assume the debt obligation on its original terms and conditions."[176]

f. Remedies.—TILS makes a number of changes in the remedy provisions of TIL. First, an award of civil penalties and attorneys' fees to consumers in private litigation for TIL violations will be available only in the event the creditor fails to comply with one of the important disclosure requirements.[177] This may reduce some of the litigation over technical disclosure defects. Second, TILS provides that the agencies which have responsibility for enforcing TIL are now authorized to seek restitution from creditors who have violated the truth in lending laws. The new law provides:

> In carrying out its enforcement activities under this section, each agency . . . in cases where an annual percentage rate or finance charge was inaccurately disclosed, shall notify the creditor of such disclosure error and is authorized . . . to require the creditor to make an adjustment to the account of the person to whom credit was extended, to assure that such person will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.[178]

The agency *must* require an adjustment when it determines that the disclosure error resulted from a clear and consistent pattern or practice of violations, gross negligence, or a willful violation intended to mislead the persons to whom the credit was extended.[179] However, there are some mitigating factors. For example, no adjustment should be ordered if the adjustment would have a significantly adverse impact upon the safety or soundness of the creditor.[180] This potential for a broad restitution remedy poses a significant new exposure for creditors.

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[175]S. Rep. No. 73, 96th Cong., 2d Sess. 17, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 834, 892.

[176]Pub. L. No. 96-221, § 614(a), 94 Stat. 178 (1980) (amending 15 U.S.C. § 1638(a)(13) (1976)).

[177]15 U.S.C. § 1640(a)(3) (1976).

[178]Pub. L. No. 96-221, § 608(a), 94 Stat. 171 (1980) (amending 15 U.S.C. § 1607 (1976)).

[179]*Id.*

[180]*Id.*

Finally, there are some miscellaneous changes in remedies. For example, multiple obligors may only recover one civil penalty.[181] This reverses the position taken by the United States Court of Appeals for the Seventh Circuit.[182] Also, the period of time during which a creditor may discover and correct an error without being exposed to liability for civil penalties has been extended from fifteen to sixty days.[183]

2. Acceleration Clauses and Deference to Federal Reserve Opinion.—As Section J.1.e. of this Survey suggests, TILS has eliminated the requirement for disclosure of the amount or method of computing default, delinquency, or charges payable in the event of late payments. Instead, the creditor must state that the customer should refer to the contract document for information on late payment charges or, in particular, acceleration rights. However, this past year, before TILS, the United States Supreme Court decided an issue involving this disclosure requirement which had been resolved in different ways by various courts and by the Federal Reserve Board staff.[184] The issue is whether an acceleration clause is a term which must be disclosed as a charge payable in the event of late payment. In the course of deciding that acceleration clauses, in and of themselves, were not late payment charges,[185] the Supreme Court made some interesting observations concerning the deference which should be given to Federal Reserve Board staff opinions construing TIL. The court said that "[u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive."[186] This is because of the general proposition that respect is due interpretations offered by agencies charged with administration of a law, especially with respect to interpretation of regulations which were created by the agency offering the interpretation. Also, Congress has recognized the influence of the Federal Reserve Board's staff opinions by giving creditors a defense based on good faith compliance with official staff opinions. Finally, the sheer complexity of TIL calls for deference to the agency. In the context of this complexity the correct answer to a problem is often a result of compromise. "[S]triking the appropriate balance is an em-

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[181]Pub. L. No. 96-221, § 615(a), 94 Stat. 180 (1980) (amending 15 U.S.C. § 6140(d) (1976)).

[182]Mirabal v. General Motors Acceptance Corp., 537 F.2d 871 (7th Cir. 1976).

[183]Pub. L. No. 96-221, § 615(a), 94 Stat. 180 (1980) (amending 15 U.S.C. § 1640(b) (1976)).

[184]Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980). The various views expressed in the courts and by the Federal Reserve are set forth in the opinion.

[185]*Id.* at 561.

[186]*Id.* at 565.

pirical process that entails investigation into consumer psychology and that presupposes broad experience with credit practices."[187]

The Federal Reserve Board staff had repeated the opinion that if a "creditor rebates unearned finance charges in connection with prepayment upon acceleration using the same method as for voluntary prepayment and that method has been properly disclosed . . . there is no default charge."[188] The Supreme Court embraced this reasoning and reversed the court of appeals decision which rejected it.[189]

3. Informal Workout Agreements.—In *Bright v. Ball Memorial Hospital Association*,[190] the court of appeals for the seventh circuit had occasion to decide whether a hospital collection procedure amounted to a credit transaction within the meaning of TIL and whether TIL disclosures were required. This case involved Ball Memorial Hospital which operates a general public hospital admitting all persons without regard to ability to pay. Patients who do not pay bills upon discharge from the hospital are sent an initial bill on the fourth day after discharge which delineates the specific charges assessed to their accounts. On the reverse side of this initial bill is a schedule of information headed "**FINANCE CHARGE**" which informs the patient that a finance charge of three-fourths of one per cent per month or a fifty cent handling charge, whichever is greater, will be added to any balance unpaid for thirty days or more. No such charge is imposed if the bill is paid in full within the thirty days. If the patient has not made payment on the eighteenth day after discharge, the patient is mailed the first billing statement which indicates a total amount due. This bill states that "[y]our account is now due and payable. Please remit today." On the reverse side of this statement there is again a schedule of information headed "**FINANCE CHARGE**" which is the same as the schedule sent on the initial bill except that there is some additional information concerning the amounts that will have to be paid monthly in order to complete payment of the amount due. Where no payment arrangements have been made on the forty-eighth day after discharge, the patient is sent a second billing statement identical to the first billing statement, except that the face of the second statement contains a warning in the following language: "No doubt you have overlooked payment of your account, please make your remittance now." At this point the Ball Memorial Hospital considers the account to be

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[187] *Id.* at 568-69.

[188] *Id.* at 563-65 n.8 (quoting Federal Reserve Board information letter number 1324).

[189] 444 U.S. at 570.

[190] 616 F.2d 328 (7th Cir. 1980).

delinquent. If no payment arrangements are made, the hospital sends a third statement on the sixty-second day after discharge. The statement is identical to the first two, except that it contains stronger language. Along with this statement, in-patients automatically receive a coupon payment book which offers the patient various monthly plans for repayment. On the seventy-sixth day after discharge a patient who has not arranged to pay or begun paying her bill is sent a fourth statement identical to the first three except that it bears an even stronger statement on the delinquency. The fifth and final statement is mailed on the ninetieth day. It is stamped "Final Notice" in red ink and warns that the account will soon be turned over to a collection agency. At the same time these written statements are being sent, the hospital attempts to make contact with the patient by telephone. The decision to turn the account over to a collection agency is made on a case by case basis after the fifth and final statement, but no accounts are turned over to a collection agency if the patient is making some form of payment.[191]

Two patients who received these statements from the hospital filed a class action alleging TIL violations. The United States district court dismissed the action, apparently holding that as to its billing practices, the hospital was not a creditor within the meaning of TIL.[192] The court of appeals concluded that as to some of its patients, the hospital was a creditor,[193] however, it affirmed the district court's dismissal of the case on the grounds that the hospital did not consummate a credit transaction with either of the named plaintiffs.[194] One of the plaintiffs, nearly four months after discharge, entered into an oral agreement with the hospital to pay her bill at fifteen dollars per month. Several days later the oral agreement was modified to require payments of twenty dollars per month. No payments were made pursuant to any of these agreements, but several months later the plaintiff paid thirty dollars to the hospital, which amount was credited to her account. Thereafter, another oral agreement was made providing that the entire obligation of about $930 would be satisfied if the plaintiff paid fifteen dollars per month for twenty-four months.[195] The court of appeals concluded that these oral agreements did not constitute "consummation of a credit transaction."[196] Instead, they were informal workout arrangements. The

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[191]The billing procedures are set forth in a portion of the opinion entitled "Background." *Id.* at 330-32.

[192]*Id.* at 333.

[193]*Id.* at 336.

[194]*Id.* at 338-39.

[195]*Id.* at 332.

[196]*Id.* at 335.

terms of these oral agreements were not consistent with any of the payment plans set forth in the statements sent by the hospital and they were not memorialized by any writing. They were thus not credit transactions within the meaning of the TIL laws and did not require disclosures despite the fact that they called for payment in more than four installments and may have entailed a monthly charge of three quarters of one per cent on any outstanding balance. The fact that the plaintiff actually paid thirty dollars did not satisfy either of the earlier workout agreements or the terms of the coupon book or statements. It amounted to a one-time partial payment of the account. The hospital's acceptance of this payment did not constitute an agreement to a credit transaction.

4. Finance Charges v. Late Payment Charges.—In the *Bright* case, the plaintiffs further argued that a credit agreement had been consummated because the hospital had imposed a finance charge in connection with their billing procedure. The plaintiffs pointed out that the hospital actually assessed a monthly charge of three quarter per cent of any outstanding balance or fifty cents, whichever was greater, and attempted to collect these charges.[197] The court of appeals concluded that these charges were not finance charges, but, instead, were late payment charges.[198] A late payment charge is distinguished from a finance charge by Regulation Z, section 226.4(c) which provides that "[a] late payment . . . charge is not a finance charge if imposed for actual *unanticipated* late payment, delinquency, default, or other such occurrence."[199] The plaintiffs argued that the hospital anticipated a substantial volume of these charges and budgeted income of $78,000 a year from this type of charge. However, the court noted that this income was not anticipated in individual cases, but was anticipated as a result of a year's business.[200] It concluded that charges do not become finance charges simply because a business may expect to have delinquent accounts and anticipate revenue from these charges.[201] Rather, the word "unanticipated" in Regulation Z section 226.4(c) refers to the failure of any particular customer to pay her bill on time.[202] Because the charge was not a finance charge its imposition did not consummate a credit transaction and the district court's dismissal was affirmed.[203]

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[197] *Id.*

[198] *Id.* at 338.

[199] 12 C.F.R. § 226.4(c) (1980) (emphasis added).

[200] 616 F.2d at 337.

[201] *Id.*

[202] *Id.*

[203] *Id.* at 338-39.

VII. Criminal Law and Procedure

ALAN RAPHAEL*
ALLEN STEINBERG**

A. Sentencing

Probably the most significant change in Indiana's criminal laws in recent years was the adoption of a new sentencing structure.[1] Under prior law, most sentences were for indeterminate periods of time, with the actual length of time served determined by the paroling authorities. Under the new code, the legislature has set presumptive sentences and has specified maximum amounts of time which may be subtracted because of mitigating factors or added as a result of aggravating factors.[2] Several decisions within the survey period have clarified the workings of the new sentencing system.

In determining what sentence to apply within the specified range of sentences, the trial court "shall consider the risk that the person will commit another crime, the nature and circumstances of the crime committed, and the prior criminal record, character, and condition of the person."[3] If the sentence imposed is the basic or presumptive sentence, the trial court is not required to state any reasons for imposing the sentence and the reviewing court will assume that the trial court considered these mandatory criteria.[4]

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[1] IND. CODE §§ 35-50-2-1 to -9 (Supp. 1980).

[2] A separate section spells out when and how the death penalty may be imposed. IND. CODE § 35-50-2-9 (Supp. 1980). Except where capital punishment is specifically referred to in this section, references to sentencing procedures refer to noncapital cases. For a discussion of the legislative history leading to adoption of the new structure, *see* Kerr, *Foreword: Indiana's Bicentennial Criminal Code, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 1, 27-34 (1976).

[3] IND. CODE § 35-4.1-4-7(a) (Supp. 1980).

[4] Gardner v. State, 388 N.E.2d 513 (Ind. 1979). The rule, requiring the court to give reasons when it sets sentences above or below the presumptive sentence but not when the presumptive sentence is imposed, is consistent with the statutory requirement:

> Before sentencing a person for a felony the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and call witnesses and otherwise to present information in his own behalf. The court shall make a record of the hearing, including:
>
> (1) a transcript of the hearing;

In *Gardner v. State*,[5] the defendant was convicted of murder and sentenced to a term of sixty years, consisting of the presumptive sentence of forty years plus the maximum twenty years allowed for aggravating circumstances.[6] The Indiana Supreme Court held that the scope of its review of the sentence was governed by the Rules for Appellate Review of Sentences: "2(1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender."[7]

Finding no mitigating circumstances,[8] the *Gardner* court viewed as aggravating circumstances:[9] (1) A long history of deviant sexual

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(2) a copy of the presentence report; and

(3) if the court finds aggravating circumstances or mitigating circumstances, a statement of the court's reasons for selecting the sentence that it imposes.

IND. CODE § 35-4.1-4-3 (Supp. 1980).

[5]388 N.E.2d 513 (Ind. 1979).

[6]IND. CODE § 35-50-2-3(a) (Supp. 1980).

[7]388 N.E.2d at 517.

[8]IND. CODE § 35-4.1-4-7(b) (Supp. 1980) provides:

The court may consider these factors as mitigating circumstances or as favoring suspending the sentence and imposing probation:

(1) The crime neither caused nor threatened serious harm to persons or property, or the person did not contemplate that it would do so.

(2) The crime was the result of circumstances unlikely to recur.

(3) The victim of the crime induced or facilitated the offense.

(4) There are substantial grounds tending to excuse or justify the crime, though failing to establish a defense.

(5) The person acted under strong provocation.

(6) The person has no history of delinquency or criminal activity, or he has led a law-abiding life for a substantial period before commission of the crime.

(7) The person is likely to respond affirmatively to probation or short-term imprisonment.

(8) The character and attitudes of the person indicate that he is unlikely to commit another crime.

(9) The person has made or will make restitution to the victim of his crime for the injury, damage, or loss sustained.

(10) Imprisonment of the person will result in undue hardship to himself or his dependents.

These criteria do not limit the factors the court may consider as mitigating. *Id.* § 35-4.1-4-7(d).

[9]*Id.* § 35-4.1-4-7(c) provides:

The court may consider these factors as aggravating circumstances or as favoring imposing consecutive terms of imprisonment:

(1) The person has recently violated the conditions of any probation, parole, or pardon granted him.

(2) The person has a history of criminal activity.

(3) The person is in need of correctional or rehabilitative treatment

behavior, (2) the heinous and aggravated nature of the offense,[10] (3) the destruction of evidence and hiding of the victim's body, and (4) the fact that a lesser sentence would depreciate the seriousness of the crime. The defendant argued that he did not have a serious criminal record[11] and that information he had given to the probation officer making the presentence report should not have been used against him in determining his sentence.[12] The supreme court found no fifth amendment violation in the trial court's use of the information volunteered by the defendant to the probation officer.[13] Regarding the record of prior criminal activity, the court held, "The presumption of innocence does not extend to the sentencing proceedings."[14] Thus, acts which did not lead to convictions, presumably even prior acquittals, could be used to show prior criminal activity.[15]

Griffin v. State[16] provides a useful discussion of the aggravation of a sentence based upon the defendant's prior criminal activity which had not been reduced to conviction. The defendant was convicted of armed robbery of a Hook's drugstore. He was given a twenty year sentence, ten years presumptive plus the maximum ten years for aggravating circumstances. The trial court found as aggravating factors the defendant's prior criminal activity and "the pattern of repeated criminal activity with a weapon involved which endangers the safety of the citizenry."[17] Griffin had previously been convicted of robbery, shoplifting, and uttering a forged instrument. The only violent crime, robbing another Hook's drugstore two days prior to the

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that can best be provided by his commitment to a penal facility.

(4) Imposition of a reduced sentence or suspension of the sentence and imposition of probation would depreciate the seriousness of the crime.

(5) The victim of the crime was sixty-five (65) years of age or older.

(6) The victim of the crime was mentally or physically infirm.

These criteria do not limit the factors the court may consider as aggravating. *Id.* § 35-4.1-4-7(d).

[10]After the victim rebuffed defendant's sexual advances, she was stabbed by defendant. The victim then begged defendant to take her to a hospital so that she could be treated and could continue to raise her children. Defendant rejected these entreaties, and the victim died.

[11]The defendant had never been convicted of a crime except for making obscene phone calls. He had been interviewed by police more than once in the past but had never been accused of other crimes.

[12]The opinion did not discuss the nature of defendant's sexual proclivities; presumably, the defendant divulged that information to the probation officer.

[13]388 N.E.2d at 520.

[14]*Id.* at 519.

[15]*Id.* at 519-20 (quoting Note, *A Hidden Issue of Sentencing: Burdens of Proof for Disputed Allegations in Presentence Reports*, 66 GEO. L.J. 1515, 1541-42 n.147 (1978)). *But see* text accompanying notes 22-25 *infra*.

[16]402 N.E.2d 981 (Ind. 1980).

[17]*Id.* at 984.

robbery for which he was tried, was introduced at the sentencing hearing. Although Griffin was never tried for the earlier robbery, the court held that "a sentencing judge does not err in considering a prior arrest or prior criminal activity which has not been reduced to a conviction."[18]

The *Griffin* court distinguished this situation from the one involved in *State v. McCormick*[19] in which the court held that a defendant in a capital murder trial would be denied due process of law if the same jury which heard evidence in the murder trial was allowed also to consider, at the penalty stage, the defendant's commission of an unrelated killing that did not result in a conviction.[20] In distinguishing these cases, the court in *Griffin* held that a more stringent procedural standard is required in capital cases than is required in non-capital cases and that the existence of a sentencing range in the non-capital cases gives the trial court greater discretion in determining what constitutes an aggravating circumstance.[21]

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[18]*Id.* at 983 (citing McNew v. State, 391 N.E.2d 607 (Ind. 1979); Gardner v. State, 388 N.E.2d 513 (Ind. 1979)).

[19]397 N.E.2d 276 (Ind. 1979).

[20]*Id.* at 281.

[21]402 N.E.2d at 984. The *McCormick* court examined the constitutionality of IND. CODE § 35-50-2-9(b)(8) (Supp. 1980). This section lists an aggravating circumstance which, if proven beyond a reasonable doubt, may lead to recommendation of the death penalty. Section 35-50-2-9 provides: "(a) The state may seek a death sentence for murder by . . . prov[ing] beyond a reasonable doubt [that] . . . (b) . . . (8) [t]he defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder." IND. CODE § 35-50-2-9 (Supp. 1980). The trial court had dismissed the count charging the other murder as an aggravating factor, reasoning:

> "Subsection (b)(8) allows the State to secure a conviction on a strong murder case, then seek the death penalty by proving a weak case before a jury which is undeniably prejudiced. This opens the door to death penalty recommendations upon a level of proof lower than proof beyond a reasonable doubt."

397 N.E.2d at 280 (quoting trial record).

The supreme court viewed subsection (8) as different from all of the other listed aggravating factors. *Id.* Subsections (1) through (6) related to the principal charge and were likely to require no additional evidence. Subsections (7) and (9) required proof of other past convictions which the court found "does not carry with it the emotional and prejudicial impact which would cause the death penalty to be imposed capriciously." *Id.* What was wrong with subsection (8), at least where the aggravating circumstance charged is commission of a murder wholly unrelated to the one for which the defendant has been convicted, was that it required the jury, which had just convicted the defendant, to attempt to consider fairly and impartially whether the defendant had committed another unrelated murder. *Id.* at 280-81.

Although there is much logic in the court's decision to give greater procedural protection to persons accused of capital crimes than to persons accused of other crimes, there is the possibility of similar prejudice in noncapital crimes. Although judges are expected to be less emotional than juries, is it certain that a judge, considering a defendant just convicted of a brutal assault, will be fair and impartial in

In *McNew v. State*,[22] the court announced that a sentencing judge may not consider a previous acquittal as an aggravating circumstance.[23] The conviction was nevertheless affirmed.[24] The trial court found as aggravating circumstances that the defendant had engaged in prior criminal activity, that a lower sentence would depreciate the seriousness of the crime, and that the crime was a serious one. Defendant's presentence report showed one prior conviction for armed robbery and several arrests. The arrests were for malicious trespass, curfew violations, a 1935 Beverage Act violation, and a traffic offense; most of these arrests occurred while the defendant was a juvenile. The majority found that the trial judge had heard evidence of the "serious nature of defendant's crime, especially regarding the extent of the injuries to [one of the victims]."[25] Thus, the court reasoned that it was justified in imposing an added sentence because of the seriousness of the crime.[26]

A well-reasoned dissent argued that the sentence should have been reduced to the presumptive thirty years. The dissent viewed two of the statutory criteria for aggravation, seriousness of the offense and whether imposition of a lesser sentence would depreciate the seriousness of the crime, as inappropriate justifications for imposing an aggravated sentence. The dissent stated:

> It is my opinion that the trial judge's addition of ten years to the Class A felony sentence is not adequately sup-

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determining as an aggravating circumstance whether that defendant had committed another similar brutal assault for which the defendant had not been tried or convicted? The same question arises if the crimes are ones to which society attaches particular opprobrium, for example, selling hard drugs to minors or beating helpless persons. Perhaps due process considerations require extension of the *McCormick* decision rather than its restriction to capital cases only.

[22]391 N.E.2d 607 (Ind. 1979).

[23]*Id.* at 612. In arriving at a forty year sentence for a Class A robbery, the trial judge indicated that he had considered an acquittal of a charge of armed robbery as part of the prior criminal activity of the defendant. The sentence consisted of a thirty year presumptive sentence plus ten years for aggravating circumstances. The supreme court agreed with the defendant's argument that considering this acquittal was improper:

> A not guilty judgment is more than a presumption of innocence; it is a finding of innocence. And the courts of this state, including this Court, must give exonerative effect to a not guilty verdict if anyone is to respect and honor the judgments coming out of our criminal justice system.

Id.

[24]391 N.E.2d at 612.

[25]*Id.*

[26]*Id.* Seriousness of injury to a victim may be a very appropriate criteria for mitigation or aggravation of a crime of which an element is causing injury to the victim. Such a reason should be indicated clearly by the trial court rather than guessed at by a reviewing court.

> ported by the record of his reasons for such action. I believe that the "seriousness of the crime" was taken into account when the Legislature fixed the penalty of thirty years. If the circumstances attendant to the commission of this particular crime rendered it more culpable than such crime generally, the judge should have related his reasons in detail sufficient to enable reviewing authority to assess them. Otherwise, the statute may be utilized to foster arbitrariness in sentencing.
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> . . .
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> Although set forth in the code as one of the criteria which may be considered as an aggravating circumstance, I believe the fourth enumerated cause "imposition of a reduced sentence or suspension of the sentence and imposition of probation would depreciate the seriousness of the crime," to be misplaced among such criteria, as a result of an error in legislative draftsmanship. By its terms, it is a basis or criteria for denying probation or reducing the sentence. It does not purport to be a reason for increasing the sentence.
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> . . . Therefore, although there may very well have been good and sufficient reasons in the mind of the trial judge for adding to the sentence, upon the record before us I cannot agree that such action was reasonable. The case probably illustrates the need for trial judges to be more specific and detailed in relating their reasons for increasing or reducing the sentences prescribed by the Legislature.[27]

The trial court in *Hinton v. State*[28] showed a reasonable evaluation of aggravating and mitigating circumstances in determining a sentence. However, the supreme court's discussion of the case included acceptance of some questionable criteria for aggravation. The defendant was convicted of voluntary manslaughter and sentenced to fifteen years in prison, five years based upon aggravating circumstances. The judge mentioned two factors he treated as mitigating, that the defendant had no prior adult criminal record and that he was eighteen years of age at the time of the crime. Balanced against these mitigating factors was the particularly heinous nature of the crime. The sentencing judge indicated: "'It seems to me that this was just a flat execution on your part. There's no other explanation for shooting a man in the head while he is lain prone before you. For that reason, the standard sentence is not adequate.'"[29]

The supreme court also indicated other grounds for upholding

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[27]391 N.E.2d at 613 (Prentice, J., dissenting).

[28]397 N.E.2d 282 (Ind. 1979).

[29]*Id.* at 285.

the sentence. First, the court noted that the judge considered the presentence report. However, because consideration of that report is required by statute,[30] this action is not a proper criterion for sentencing. Second, the court noted that the judge had considered that the "defendant was in need of correctional treatment that could best be provided by his commitment to a penal facility."[31] This consideration is another inappropriate criterion for determining aggravation of sentences.[32] There is little treatment provided at our penal facilities and many people question whether treatment is appropriate or possible. Unless there is specific treatment which a judge believes is appropriate for a convicted offender and which is best provided at a prison, this factor should not be used to justify increased incarceration or any incarceration at all. If the "treatment" that is available is that of keeping the person confined, it is obvious that such "treatment" can best occur in a prison. It is not appropriate, however, to increase a term of imprisonment on the rationale that the prison is most likely to keep the prisoner confined. Third, the court referred to the conclusion that imposition of a lesser sentence would depreciate the seriousness of the crime. If this is a valid criterion, then in practice it could be used indiscriminately to add years to the sentences of convicted persons, particularly of persons convicted of the most serious felonies.

In *Taylor v. State*,[33] the court of appeals found no impropriety in the trial court's use of a worksheet[34] to determine the sentence. The appellate court found that the judge had used both the worksheet and the presentence report[35] in calculating the sentence, and that the judge articulated adequate reasons to justify the sentence.[36] The defendant was convicted of attempted theft and was sentenced to a term of four years, two years presumptive and two years for aggravating circumstances. In justifying the sentence, the judge relied upon the meaningless phrases that the defendant could benefit from "commitment to a penal facility" and that a lesser sentence "would depreciate the seriousness of the crime."[37] In addition, the court

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[30]IND. CODE § 35-4.1-4-9 (1976).

[31]397 N.E.2d at 285.

[32]IND. CODE § 35-4.1-4-7(c)(3) (Supp. 1980).

[33]391 N.E.2d 662 (Ind. Ct. App. 1979).

[34]The worksheet was prepared by the Indiana Judicial Center (IJC) for use by Indiana judges.

[35]The presentence report included: (1) a diagnostic report, (2) a psychologist's evaluation, (3) a presentence investigator's evaluation, and (4) a summary of defendant's background. 391 N.E.2d at 664.

[36]*Id.*

[37]*Id.*

found that the defendant had a history of criminal activity, that he was twenty-one years of age, and that he showed no remorse.[38]

It is not clear why the court considered youth an aggravating factor. Perhaps the court theorized that young offenders are more likely to commit further offenses.[39] However, other judges have viewed youth as a mitigating factor,[40] presumably on the theory that young criminals are not yet hardened nor committed to a life of crime. Application of such contradictory criteria can hardly lead to uniformity of punishment or an appearance of fairness in sentencing. Making remorse a significant factor in sentencing will reward those who falsely show remorse and penalize those who, by insisting on their innocence, are not in a position to express remorse. If a sentence is being imposed for the criminal act, arguably, remorse should be irrelevant.

The worksheet factors used to assess the offender's danger to society appear generally to be appropriate and helpful to judges. The *Taylor* court assigned points for each prior felony or misdemeanor conviction as well as for each prior incarceration.[41] Points were also assigned if the offender was in custody or out on bail, parole, or probation at the time of the crime, or if the offender had previously had probation or parole revoked.[42] However, it is hard to understand why incarceration for a prior conviction leads to an assessment of additional points against the offender. Perhaps this method reflects the belief that a prior conviction which led to probation was not as serious as one which led to incarceration. This rationale, however, ignores the great disparities in sentencing practices from one judge to another which may account for whether a prior sentence actually has been served. A more logical but less likely rationale is that our prisons are so harmful to offenders that a person who has served a sentence is more dangerous to society than a person who has never been subjected to our correctional system.

In *Taylor*, points were subtracted if the offender made a realistic restitution agreement, if the offender was over twenty-five at the time of the first serious offense, or if the offender had been substantially law-abiding for the five years prior to the offense for which the sentence was to be imposed.[43]

The legislature may determine that a trial court may not sus-

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[38]*Id.*

[39]The IJC worksheet considers as a mitigating factor that the offender was at least twenty-five years of age upon committing his or her first serious offense.

[40]Hinton v. State, 397 N.E.2d 282 (Ind. 1979).

[41]391 N.E.2d at 663.

[42]*Id.*

[43]*Id.* at 663-64.

pend part or all of the sentence for certain crimes. The Indiana Supreme Court in *State v. Palmer*[44] reversed a trial court's determination that a statute[45] barring suspension of sentences for certain crimes was unconstitutional. The defendant was convicted of first degree burglary, for which the sentence at the time was a non-suspendable, indeterminate sentence of between ten and twenty years. The trial court nevertheless suspended the sentence and reduced it to 205 days less jail time already served, plus a probation term of five years. The supreme court determined that probation is a privilege granted exclusively by statute and that the lawmakers may "provide for the length of sentences for offenses and to regulate the power of courts to grant or deny probation as they see fit."[46] Under current Indiana criminal law, trial courts may not suspend any part of the sentence for a felony if the convicted person has a prior unrelated felony conviction or if the current conviction is for one of a long list of offenses.[47]

B. Right to Counsel

In *Brunson v. State*,[48] the court reaffirmed that the Indiana Constitution[49] establishes the right of persons accused of any crime to employ counsel.[50] This right to counsel must be provided for indigents at the state's expense.[51] Therefore, this state right is greater

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[44]386 N.E.2d 946 (Ind. 1979).

[45]IND. CODE § 35-7-1-1 (1976).

[46]386 N.E.2d at 949.

[47]IND. CODE § 35-50-2-2(a) (Supp. 1980).

[48]394 N.E.2d 229 (Ind. Ct. App. 1979).

[49]IND. CONST. art. 1, § 13 provides in part:

> In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.

[50]394 N.E.2d at 231.

[51]The supreme court in Moore v. State, 401 N.E.2d 676 (Ind. 1980), stated "The guarantee of the right to be represented by counsel includes the right for an indigent defendant in a criminal prosecution to have counsel provided for him at state expense." *Id.* at 678. *Accord*, Frazier v. State, 391 N.E.2d 1192, 1194 (Ind. Ct. App. 1979).

The *Moore* court recognized several factors to be considered in determining a defendant's indigency:

> [T]he defendant does not have to be totally without means to be entitled to counsel. If he legitimately lacks the financial resources to employ an attorney, without imposing substantial hardship on himself or his family, the court must appoint counsel to defend him. . . . The determination . . . is not to be made on a superficial examination of income and ownership of property but must be based on as thorough an examination of the defendant's total finan-

than the federal constitutional guarantee[52] which requires "only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."[53]

The defendant in *Brunson* was convicted of resisting law enforcement and was sentenced to thirty days imprisonment and payment of a $100 fine for that misdemeanor.[54] Brunson argued on appeal that the trial court erred when it failed to advise him of his right to an attorney at the misdemeanor trial. There is no question that the Federal Constitution guarantees that a person accused of a crime has the right to employ an attorney on his or her own behalf.[55] Here, the defendant also had a right to appointed counsel if he was indigent because the trial court imposed a sentence of incarceration.[56] Although the *Brunson* opinion does not mention whether the defendant was indigent, the court must have been considering the provision of counsel to indigents when it indicated that Indiana has a constitutional guarantee of the right to counsel different from that provided by the Federal Constitution.[57]

The federal and state constitutional provisions regarding right to counsel both appear on their faces to apply to all criminal prosecutions. The *Brunson* court, however, held that "[u]nlike the federal constitutional guarantee, the provisions of Section 13 establish a right to counsel for all persons charged with a criminal misdemeanor, *regardless of whether the charge ultimately results in the misdemeanant's imprisonment.*"[58]

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cial picture as is practical. The record must show that the determination of ability to pay includes a balancing of assets against liabilities and a consideration of the amount of the defendant's disposable income or other resources reasonably available to him after the payment of his fixed or certain obligations. . . . The fact that the defendant was able to post a bond is not determinative of his nonindigency but is only a factor to be considered. . . . The court's duty to appoint competent counsel arises at any stage of the proceedings when the defendant's indigency causes him to be without the assistance of counsel.

401 N.E.2d at 678-79.

[52]U.S. CONST. amend. VI provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

[53]Scott v. Illinois, 440 U.S. 367, 374 (1979).

[54]He also was convicted of a felony, unlawful possession of a deadly weapon. That conviction was reversed for failure of the trial court to advise Brunson of his constitutional or statutory rights before the court accepted his guilty plea. 394 N.E.2d at 231-32.

[55]440 U.S. at 370.

[56]*Id.* at 373.

[57]394 N.E.2d at 231.

[58]*Id.* (emphasis added).

Some confusion exists over whether failure to advise a defendant electing to represent himself of the dangers and disadvantages of self-representation is per se reversible error. In *Shelton v. State*,[59] the defendant appealed from his conviction of three counts of forgery. Although the trial court had advised Shelton of his rights to assistance of counsel and to appointment of counsel if he was indigent, Shelton refused counsel and pleaded guilty. The court of appeals acknowledged that a defendant has the right to represent himself,[60] but it stated that the trial court has "'the serious and weighty responsibility . . . of determining whether there is an intelligent and competent waiver by the accused.'"[61]

In determining whether a valid waiver had occurred, the court considered that Shelton was aware of his right to counsel, was advised by the court about the nature of the charges and the consequences of the guilty plea, was forty-four years old, and had been a defendant in several prior, unrelated criminal prosecutions. Although the court of appeals deemed it the better practice for the trial court to advise the defendant of the advantages of representation, it found "failure to so advise [was] not per se reversible error. The determination of whether there [had] been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances . . . including the background experience and conduct of the accused."[62] Upon evaluation of the record, the court found that the facts and circumstances revealed that Shelton knowingly and intelligently waived his right to counsel.[63]

It is difficult to understand why these facts show a proper waiver of counsel. The knowledge of the right to counsel does not show a knowing waiver, although ignorance of the right obviously would preclude a knowing waiver. The judge's comments to the defendant about the charge against him and the consequences of his plea were not adequate substitutes for independent counsel. As the court acknowledged, Shelton's limited education weighed against a finding of proper waiver; his age appeared to be irrelevant. Shelton's previous trials for other offenses did not shed light upon his current waiver of counsel. Even without adopting a per se rule requiring advice about the advantages and disadvantages of pro se representation, the court, based on the facts presented, should have reversed the conviction because of inadequate waiver of counsel.

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[59]390 N.E.2d 1048 (Ind. Ct. App. 1979).

[60]Faretta v. California, 422 U.S. 806 (1975).

[61]390 N.E.2d at 1050 (quoting Johnson v. Zerbst, 304 U.S. 458, 465 (1938)).

[62]390 N.E.2d at 1051.

[63]*Id.*

Other Indiana appellate decisions have adopted the per se rule rejected by the *Shelton* court. In *McDandal v. State*,[64] the court determined that the defendant was not adequately informed of his right to counsel, by merely asking him if he needed an attorney;[65] nor could an effective waiver of that right be "inferred from a silent record."[66] Moreover, the court noted that "where . . . the defendant is allowed to proceed to trial without counsel, *the record must show that the defendant was expressly advised of both his right to counsel and the disadvantages of self-representation.*"[67]

C. Double Jeopardy and Lesser Included Offenses

In *Thompson v. State*,[68] the Indiana Supreme Court upheld a one to ten year conviction for entering with the intent to commit a felony.[69] The court rejected the argument raised by the defendant and the two dissenting justices,[70] that the maximum period for which the defendant could be imprisoned was five years. The rejected argument was based on *Heathe v. State*[71] in which the supreme court reduced a sentence for entering to commit a felony from ten to five years.[72] The *Thompson* court noted that Heathe had been convicted of entering with intent to commit a felony as a lesser included offense of second degree burglary;[73] that second degree burglary carried a maximum penalty of five years' imprisonment; and that *Heathe* simply ruled that it was unconstitutional[74] to sentence the defendant for a longer period under the lesser included offense of entering to commit a felony than would have been available had the defendant been convicted of the greater offense of second degree burglary.[75] In distinguishing *Heathe*, the court noted that Thompson was initially charged with first degree burglary;[76] that he had plead-

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[64]390 N.E.2d 216 (Ind. Ct. App. 1979).

[65]*Id.* at 217.

[66]*Id.* at 216.

[67]*Id.* at 217 n.2 (emphasis added). *Accord*, Wallace v. State, 361 N.E.2d 159 (Ind. Ct. App. 1977) ("At no time was he asked if he were aware he was waiving an important constitutional right or the possible consequences of such a decision on his part." *Id.* at 163).

[68]389 N.E.2d 274 (Ind. 1979).

[69]*Id.* at 278. IND. CODE § 35-13-4-5 (1976) (repealed 1977).

[70]389 N.E.2d at 278 (DeBruler, J., dissenting) (Prentice, J., concurring with dissent).

[71]257 Ind. 345, 274 N.E.2d 697 (1971).

[72]389 N.E.2d at 277. The statutory penalty for entry with intent to commit a felony is one to ten years' imprisonment. IND. CODE § 35-13-4-5 (1976) (repealed 1977).

[73]389 N.E.2d at 277. IND. CODE § 35-13-4-4(b) (1976) (repealed 1977).

[74]IND. CONST. art. 1, § 16.

[75]389 N.E.2d at 277-78.

[76]IND. CODE § 35-13-4-4(a) (1976) (repealed 1977). The distinction between first and

ed guilty to the lesser included offense of entering with intent to commit a felony; and that since the maximum penalty for first degree burglary is twenty years' imprisonment, the trial judge could properly sentence the defendant to ten years' imprisonment for the lesser offense of entering to commit a felony.[77]

The dissent rejected the majority's distinction between *Heathe* and *Thompson*. Instead, the dissent interpreted *Heathe* as holding that the sentence imposed for a lesser included offense may not exceed the sentence available for the greater offense regardless of whether the greater offense is charged or whether there has been an actual trial for the greater offense.[78] The dissent appeared to maintain that entering with the intent to commit a felony must always be considered as a lesser included offense of *second* degree burglary which carries a maximum penalty of five years' imprisonment. Therefore, the maximum penalty for entering to commit a felony should be five years' imprisonment regardless of whether the entering charge is based upon acts which constitute first or second degree burglary.

There were two court of appeal decisions[79] which applied the Indiana Supreme Court holding of *Elmore v. State*.[80] In *Elmore* the court ruled that, when evaluating whether multiple count prosecutions for crimes arising out of the same act violated double jeopardy,[81] the test to be applied was whether "'each [statutory] provision [charged] requires proof of an additional fact which the other does not.'"[82]

In *Pillars v. State*,[83] the court ruled that a Criminal Rule 4(C)[84] discharge of the defendant on a charge of assault with intent to kill[85]

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second degree burglary was based on the structure burglarized. First degree burglary involved entry into places of human habitation while second degree burglary involved entry into all other structures.

[77]389 N.E.2d at 278.

[78]*Id.* (DeBruler, J., dissenting).

[79]State v. Redmon, 390 N.E.2d 1044 (Ind. Ct. App. 1979); Pillars v. State, 390 N.E.2d 679 (Ind. Ct. App. 1979).

[80]382 N.E.2d 893 (Ind. 1978).

[81]*See* U.S. CONST. amend. V, made applicable to the states through U.S. CONST. amend. XIV.

[82]382 N.E.2d at 895 (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)). For a more detailed discussion of *Elmore*, *see* Mead, *Double Jeopardy Protection—Illusion or Reality?*, 13 IND. L. REV. 863 (1980); Raphael, *Criminal Law and Procedure, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 187, 187-89 (1980).

[83]390 N.E.2d 679 (1979).

[84]For a discussion of the court's interpretation of IND. R. CR. P. 4(C), *see* notes 168-91 *infra* and accompanying text.

[85]IND. CODE § 35-13-2-1 (1976 & Supp. 1980).

(count I) barred prosecution of the defendant for threatening to use a deadly or dangerous weapon[86] (count II) or for aiming a weapon[87] (count III).[88] Although the court acknowledged that the latter two offenses did not technically constitute lesser included offenses, it concluded that counts II and III "accused Pillars of committing the same criminal acts which the State alleged in support of the greater offense of assault with intent to kill";[89] that without proving the acts alleged in counts II and III the state would not have been able to prove the assault charge; and that "the principle of double jeopardy precludes more than one punishment"[90] in a case where the offenses charged "addressed the same harm arising from the defendant's act."[91]

Although both *Pillars* and *Elmore* involved the propriety of multiple-count prosecutions based upon the same criminal act, the *Pillars* court failed to correctly apply *Elmore*. By focusing on the fact that all of the counts arose from the same act, the court ignored the clear language of *Elmore*: "[T]he fact that the offenses stem from the same act merely informs us that there is a potential problem; it is not a solution to the problem. The ultimate focus is on the identity of the offenses, not on the identity of their source."[92] The court in *Pillars* did not even attempt to fit its analysis within the parameters of *Elmore*.

Rather than determining whether the prosecution for counts II and III was barred by the double jeopardy clause, the *Pillars* court simply cited cases decided before *Elmore*, ruled that the prosecution was barred, and referred to the "principle of double jeopardy" in a footnote.[93] The court failed to either distinguish *Elmore* or to reconcile *Pillars* with *Elmore*. Thus, although *Elmore* seems relevant to the decision in *Pillars*, that relevance cannot be discerned in the *Pillars*' outcome.

The ruling in *Pillars* can be contrasted with the result in *State v. Redmon*.[94] In *Redmon*, the court ruled that the defendant's guilty plea, for operating a motor vehicle while his license was suspended,[95] did not preclude a subsequent prosecution for operation of a motor

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[86]*Id.* § 35-1-79-1.

[87]*Id.* § 35-1-79-5.

[88]390 N.E.2d at 684.

[89]*Id.*

[90]*Id.* at 684 n.3 (construing McFarland v. State, 384 N.E.2d 1104, 1111 (Ind. Ct. App. 1979)).

[91]390 N.E.2d at 684 n.3.

[92]382 N.E.2d at 897.

[93]390 N.E.2d at 684 n.3.

[94]390 N.E.2d 1044 (Ind. Ct. App. 1979), *vacated* 396 N.E.2d 117 (Ind. 1979).

[95]IND. CODE § 9-1-4-52 (1976 & Supp. 1980).

vehicle by an habitual traffic offender.[96] The court, quoting *Elmore*, noted that while both offenses arose from the same act, the elements of the two offenses differed.[97] Although this result may seem harsh because the defendant is punished twice for the same act, the harshness is mandated by the holding in *Elmore*.

In *Brown v. State*,[98] a double jeopardy case involving reprosecution for the same offense, the court of appeals ruled that the defendant's double jeopardy rights were not violated when the defendant's absence from his first trial caused a mistrial and necessitated a second proceeding. Although neither the defendant's counsel nor the prosecutor wished to proceed with the first trial in the defendant's absence, the trial judge proceeded determinedly. The trial judge's zeal waned, however, upon discovering that the defendant's absence prevented the state's witnesses from sufficiently identifying the defendant to prove the state's case. The judge declared a mistrial and the defendant was reprosecuted following his arrest. The court of appeals noted that the defendant's voluntary absence created a "manifest necessity" for a mistrial.[99] Accordingly, the court ruled that the mistrial and reprosecution were permissible under relevant United States Supreme Court precedent.[100]

By so ruling, the court's analysis is deficient in two respects. First, the court overlooked the fact that both the trial judge and the defendant were at fault for the mistrial. Although the defendant's conduct prevented the completion of the trial, the judge's order that a jury be empaneled caused jeopardy to attach. Thus, one can argue, the conduct of the judge caused the mistrial, and therefore, the defendant should not have been reprosecuted.[101]

The court's second oversight was its failure to discuss the trial judge's decision to declare a mistrial rather than to grant a continuance. Although the court mentioned that there was nothing in the record to indicate that the trial judge considered any alternatives to

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[96]*Id.* § 9-4-13-14.

[97]390 N.E.2d at 1046. As noted by the court, a conviction for the operation of a motor vehicle by an habitual traffic offender (HTO) requires proof that the defendant was an HTO and that he operated the vehicle while a court order prohibiting operation was in effect. Conviction for driving with a suspended license deals only with the license suspension and not with whether a defendant is an HTO.

[98]390 N.E.2d 1058 (Ind. Ct. App. 1979).

[99]*Id.* at 1065.

[100]*Id.* The Court has consistently ruled that when there is "manifest necessity" for the declaration of a mistrial, the double jeopardy clause does not bar a retrial. Arizona v. Washington, 434 U.S. 497 (1978); Gori v. United States, 367 U.S. 364 (1961); and United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

[101]"Manifest necessity" cannot be created by errors of either the prosecutor or the judge. Crim v. State, 156 Ind. App. 66, 78, 294 N.E.2d 822, 830 (1973).

a mistrial, it hastily concluded that the defendant's continued absence from the proceedings justified the trial court's decision to grant a mistrial.[102] As wrong as the defendant's conduct may have been, however, the court's lack of analysis made it difficult to determine how the trial judge discharged the duty to determine that a mistrial was "manifestly necessary" or how the appellate judges fulfilled their obligation to "satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial."[103]

In *Roddy v. State*,[104] the court of appeals analyzed when "lesser included offense" instructions should be submitted to a jury.[105] The court concluded that a trial court must first determine whether the lesser included offense is "necessarily included" in the offense with which the defendant is charged. A charge may be "necessarily included" if "by virtue of the legal definitions of the two offenses, it is impossible to commit the greater offense without first committing the lesser."[106] A charge may also be "necessarily included" if "the elements of the lesser offense, by virtue of the manner and means allegedly employed in the commission of the charged crime,"[107] are properly alleged in the charging instrument.

Upon determining that a lesser charge is "necessarily included,"[108] the trial court must then evaluate whether there is probative evidence which raises a serious dispute whether the defendant did indeed commit the elements which differentiate a lesser offense from a greater offense.[109] The court concluded that if there was no dispute

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[102]390 N.E.2d at 1064-65.

[103]Arizona v. Washington, 434 U.S. 497, 514 (1978).

[104]394 N.E.2d 1098 (Ind. Ct. App. 1979).

[105]Pursuant to IND. CODE § 35-1-39-2 (1976) (repealed 1977), a defendant "may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment or information." It appears that much of the court's holding in *Roddy* will apply to IND. CODE § 35-41-1-2 (Supp. 1980), which is the successor statute to § 35-1-39-2. Indeed, the court in *Roddy* indicated how its analysis would be affected by the passage of § 35-41-1-2. 394 N.E.2d at 1106 n.14.

[106]394 N.E.2d at 1106. These offenses were labelled "inherently included" lesser offenses.

[107]*Id.* at 1107. These offenses were labelled "possibly included" lesser offenses. Thus, a trial court must examine both the relevant criminal statutes and the charging instrument to determine if an offense is a "necessarily included" lesser offense. Likewise, the trial court must determine "[w]hether a conviction of the charged offense requires proof of an element additional to those which comprise the lesser offense." *Id.* at 1104. The court noted that this requirement was relevant under the previous criminal code and was omitted by the current statutory definition of "included offenses." *Id.* at 1105 n.11. IND. CODE § 35-41-1-2 (Supp. 1980).

[108]The court also articulated an alternate test for whether an offense is "necessarily included." 394 N.E.2d at 1104. The author found this articulation to be of little assistance in understanding the court's actions.

[109]*Id.* at 1110.

over whether the defendant committed the distinguishing elements, then the jury should not be given the opportunity to convict the defendant of the lesser offense.[110] The court reasoned that if there was no dispute over the elements which distinguished the lesser from the greater offense, "the defendant is either guilty of the offense charged or not guilty of any offense."[111] Additionally, if the distinguishing elements are not in dispute, a guilty verdict on the "lesser offense would simply be inconsistent with the evidence—and hence, . . . improper."[112] The court's requirement that there be a serious dispute over the distinguishing elements is not a new analysis. Indeed, the court relied directly on decisions of the Indiana Supreme Court.[113]

Applying this test to *Roddy*, the court concluded that under the charging instrument, both assault[114] and assault with intent to commit a felony[115] were "necessarily included" in the greater offense of commission, or attempted commission, of a felony while armed with a deadly weapon.[116] The court further ruled that because Roddy did not contest the evidence which supported the distinguishing elements between the lesser and greater offenses, the jury should not have been instructed on the lesser offenses.[117]

A defendant in a criminal case may properly agree to plead guilty to an offense otherwise barred by double jeopardy.[118] In *Lutes v.*

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[110]*Id.* at 1111.

[111]*Id.* at 1112. The court reasoned that this test "lessens the possibility of compromise verdicts between those jurors who believe the defendant guilty . . . and those who believe him not guilty." *Id.*

[112]*Id.*

[113]Lawrence v. State, 268 Ind. 330, 375 N.E.2d 208 (1978); Hash v. State, 258 Ind. 692, 284 N.E.2d 770 (1972).

[114]*See* IND. CODE § 35-13-4-7 (1976) (repealed 1977). The court concluded that assault was an "inherently included" lesser offense. 394 N.E.2d at 1108.

[115]*See* IND. CODE § 35-1-54-3 (1976) (repealed 1977). The court concluded that assault with intent to commit a felony was a "possibly included" lesser offense and that, under the charging instrument, Roddy allegedly committed all of the essential elements of this offense. 394 N.E.2d at 1109.

[116]394 N.E.2d at 1110. *See* IND. CODE § 35-12-1-1 (1976) (repealed 1977).

[117]394 N.E.2d at 1113. Alternately, the court justified its ruling by finding that the evidence was insufficient as a matter of law to establish a conviction for assault. Thus, Roddy was guilty of the greater offense without having committed the lesser included offense. This bit of legal legerdemain was possible because Roddy was charged with committing robbery through the use of force *or* violence. 394 N.E.2d at 1108. The accusation that violence or fear was used made assault a lesser included offense of armed robbery. However, Roddy had only used fear. Although use of fear alone was sufficient to support a conviction for armed robbery, it was insufficient to support a conviction for assault. *Id.* at 1113 n.29.

[118]A defendant, however, may not validly plead guilty to an offense which does not exist. In Rhode v. State, 391 N.E.2d 666 (Ind. Ct. App. 1979), Rhode was charged with criminal trespass and attempted voluntary manslaughter. He pleaded guilty to attemp-

State,[119] the defendant sought post conviction relief. He had been convicted for commission of a felony while armed,[120] a charge to which he had agreed to plead guilty in return for the state's dismissal of a pending kidnapping charge. Lutes had also been separately convicted of rape arising out of the same criminal incident. His argument, that the prior rape conviction made the later armed felony conviction void on double jeopardy grounds, was rejected by the supreme court.[121] The court noted that the defendant had been represented by counsel and knowingly accepted the proposed plea bargain. Upon this foundation the court concluded that Lutes had waived any double jeopardy claim when he accepted the plea bargain.[122]

D. Searches and Confessions

In *Bradford v. State*,[123] the court ruled that two warrantless searches of the defendant's purse violated her rights under the fourth amendment.[124] The first search, which occurred soon after

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ted reckless homicide but sought to withdraw that plea prior to sentencing, on the theory that his plea was to a nonexistent crime. The trial court denied the motion to withdraw the guilty plea. *Id.* at 667. The court of appeals reversed. *Id.* at 669.

The attempt statute requires a showing of "acting with the culpability required for commission of the crime, [and engaging] in conduct that constitutes a substantial step toward commission of the crime." IND. CODE § 35-41-5-1(a) (Supp. 1980). Reckless homicide is committed by one who "recklessly kills another human being." *Id.* § 35-42-1-5. Prior to the enactment of the penal code, Indiana law had required proof of specific intent to do the act which resulted in the injury. Beeman v. State, 232 Ind. 683, 692, 115 N.E.2d 919, 923 (1953). The state contended that the attempt statute, which required that the state show the culpability required for commission of the crime, altered prior law and allowed conviction of an attempt to commit reckless homicide without showing any specific intent.

The court cited several authorities for the proposition that crimes involving attept always involve proof of the specific intent to commit the crime. The court implied that combining the general attempt statute with any crime requiring recklessness is illogical because it is impossible to have specific intent to do something recklessly. 391 N.E.2d at 668-69 (citing R. PERKINS, CRIMINAL LAW 573-74 (2d ed. 1969); MODEL PENAL CODE § 5.01, Comment (Tent. Draft No. 10, 1960); INDIANA CRIMINAL LAW STUDY COMMISSION: PROPOSED FINAL DRAFT 477 (1974); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 59 (1972)). *Accord*, Zickefoose v. State, 388 N.E.2d 507 (Ind. 1979). The court indicated that the legislature had provided an offense which includes reckless conduct endangering another person. 391 N.E.2d at 669 (citing IND. CODE § 35-42-2-2 (Supp. 1980)).

[119]401 N.E.2d 671 (Ind. 1980).

[120]Rape was the felony involved.

[121]401 N.E.2d at 674.

[122]*Id.*

[123]401 N.E.2d 77 (Ind. Ct. App. 1980).

[124]U.S. CONST. amend. IV. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers,

police secured control over Bradford and her purse,[125] was conducted in the absence of any exigent circumstances. Accordingly, the court, relying on *Arkansas v. Sanders*,[126] ruled that the search was improper.[127] In evaluating the second search, which was an inventory search, the court balanced the relevant state interests[128] with those of the defendant.[129] The court concluded that the state's interests could have been protected by sealing and securely storing the purse; thus, the excessive intrusion was improper.[130]

In *Morris v. State*,[131] the supreme court overturned the defendant's conviction for murder. The court ruled that the defendant was detained in violation of his fourth amendment rights and that his subsequent inculpatory statements were tainted by the detention.[132] The court, treating the detention as a formal arrest,[133] noted that the police did not have an arrest warrant for the defendant. Evaluating the circumstances surrounding Morris' detention, the court concluded that the arrest was an investigatory device; that the

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and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[125]Bradford was detained after the smell of marijuana was detected escaping from a car occupied by her. At that time a search of Bradford's purse was conducted and marijuana was discovered. Bradford was then taken to jail where a second search of her purse revealed phencyclidine (PCP). Bradford challenged her convictions for possession of marijuana and PCP.

[126]442 U.S. 753 (1979). In *Sanders* the Court held that if an automobile is properly stopped and there are no exigent circumstances, the police must obtain a search warrant before searching luggage found in the car. *Id.* at 763-66.

[127]401 N.E.2d at 80.

[128]The state's interests were listed as: "(i) protection of the police from danger; (ii) protection of the police against claims and disputes over lost or stolen property; and (iii) protection of the owner's property while it remains in police custody." *Id.* (quoting Dearing v. State, 393 N.E.2d 167, 172 (Ind. 1979)).

[129]Bradford was deemed to have a valid privacy interest in the purse's contents. 401 N.E.2d at 80.

[130]*Id.*

[131]399 N.E.2d 740 (Ind. 1980).

[132]*Id.* at 744. The defendant voluntarily accompanied police to the station on the morning of the murder. At that time, he made no inculpatory statements. The following morning. Morris returned to the police station. There was no indication that the second trip was voluntary. The court ruled that any fourth amendment violation which occurred on the first trip had no effect on Morris' trial. However, the court reviewed the propriety of the later visit to the police station during which Morris made inculpatory statements.

[133]*Id.* at 741. The basis for this treatment is Dunaway v. New York, 442 U.S. 200 (1979). In *Dunaway*, the Supreme Court ruled that although the defendant was not formally arrested, his detention was the functional equivalent of a formal arrest and should be treated as an arrest for fourth amendment purposes. *Id.* at 215-16.

police lacked probable cause; and that the arrest was unlawful because it was supported by neither a warrant nor by probable cause.[134] Furthermore, the court evaluated the effect of the unlawful arrest upon Morris' inculpatory statements and concluded that the statements were indeed tainted by the arrest.[135] Accordingly, the court ruled that the inculpatory statements and subsequently discovered physical evidence should have been suppressed.[136]

The dissent, citing various pieces of testimony in the record, argued that the police had probable cause to arrest Morris.[137] The dissent also claimed that there was sufficient untainted evidence to support Morris' conviction.[138] Although it is difficult to evaluate the merits of the dissent's first argument, the validity of the second argument will be tested at the defendant's retrial.

In *Mulry v. State*,[139] a prosecutor's failure to adequately prove that arrestees were advised fully of their constitutional rights resulted in the suppression of subsequent inculpatory statements. Following their arrest,[140] the defendants made inculpatory statements in response to police questions. In reviewing the admissibility of the statements, the court evaluated whether the defendants had been properly informed of their *Miranda* rights[141] and, if so, whether the

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[134]399 N.E.2d at 743. These conclusions were supported by trial testimony. A deputy police chief stated that at the time of the defendant's detention, Morris was only a suspect and had not been arrested because the case was still under investigation. *Id.* at 742.

[135]*Id.* at 744. The court's analysis tracked that of the Supreme Court in Brown v. Illinois, 422 U.S. 590 (1975). In *Brown*, the Court held that properly advising a defendant of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), did not automatically render admissible statements made by one is unlawfully detained. Instead, the Court evaluated whether the inculpatory conduct " 'was sufficiently an act of free will to purge the primary taint of the unlawful [conduct].' " 399 N.E.2d at 742 (quoting Brown v. Illinois, 422 U.S. at 602 (quoting Wong Sun v. United States, 371 U.S. 471, 486 (1963))). Relevant factors include " '[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.' " 399 N.E.2d at 743 (quoting Brown v. Illinois, 422 U.S. at 603-04).

[136]399 N.E.2d at 744.

[137]*Id* at 744-46. (Givan, C.J., dissenting).

[138]*Id.* at 745.

[139]399 N.E.2d 413 (Ind. Ct. App. 1980).

[140]The defendants, Mulry and Trusley, were arrested and subsequently convicted of malicious trespass, *id.* at 415, in violation of IND. CODE § 35-1-66-1 (1976) (repealed 1977).

[141]Miranda v. Arizona, 384 U.S. 436 (1966). The Supreme Court held:

> When an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the ex-

inculpatory statements constituted a knowing and intelligent waiver of those rights.

The court's inquiry focused on the testimony of the arresting officer. The officer testified that he had advised the defendants of their "*Miranda* rights" by reading the rights from a card obtained from the Marion County Sheriff's Department. The officer then recited those rights for the record. The recitation, however, omitted any warnings that statements made by the arrestees could later be used against them. Based on this omission, the court ruled that the requisite *Miranda* warnings were not given, that the defendants could not have knowingly waived rights of which they were unaware, and that subsequent statements made by the defendants were improperly admitted into evidence.[142]

Furthermore, the court held that a confession obtained in violation of *Miranda* could not be admitted into evidence, even if the confessions were obtained in accordance with the requirements of the Indiana voluntariness statute.[143] The Indiana statute provides that judges shall consider various factors in evaluating the voluntariness of confessions. Although the factors listed include whether the

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ercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Id. at 478-79.

[142]399 N.E.2d at 417.

[143]*Id.* IND. CODE § 35-5-5-2 (1976) provides:

The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including but not limited to (1) the time elapsing between the arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel, and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

Miranda warnings are given, the statute also states that the absence or presence of any particular factor "need not be conclusive on the issue of voluntariness."[144] The court, however, ruled that regardless of the statute, failure to meet the requirements of *Miranda* automatically resulted in the exclusion of subsequently obtained confessions.[145] The court considered this result to be constitutionally mandated under the Supreme Court's decision in *Miranda*.[146]

The dissent interpreted the evidence as adequately demonstrating that the defendants were given their full *Miranda* warnings.[147] This interpretation was based on the arresting officer's testimony that the defendants were read their rights directly from a standard printed card. Thus, the dissent argued that the officer's failure to read one of the printed rights did not necessarily mean that the defendants were not properly advised of their rights.[148]

Mulry can be contrasted with *Grey v. State*.[149] In *Grey* the court upheld the defendant's conviction despite the fact that one set of oral *Miranda* warnings given did not warn the defendant that anything he said could be used against him. The court's ruling was based on the additional fact that the defendant was also given several sets of complete *Miranda* warnings before the defendant made any inculpatory statements.[150]

The supreme court, in *Brandon v. State*,[151] adopted the rule previously enunciated in *Clark v. State*,[152] that it is improper for the state to introduce into evidence a probable cause affidavit or search warrant when the state seeks to introduce the items seized.[153] This holding represents a repudiation of the former rule of *Mata v.*

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[144]399 N.E.2d at 417.

[145]*Id.* The court also noted that the Indiana statute is modeled after a federal statute, 18 U.S.C. § 3501(b) (1976). The court stated that although the federal statute was enacted to offset the effects of *Miranda*, the statute has not been interpreted as reducing the burden imposed on police by *Miranda*. 399 N.E.2d at 417-18 n.3.

[146]Furthermore, the court ruled that suppression of the evidence required a new trial for Mulry, but not for Trusley. 399 N.E.2d at 419. This result was based on differences in the remaining evidence presented against the two defendants: an injury suffered by Trusley during the commission of the crime left a telltale blood stain.

[147]*Id.* at 420-23 (Buchanan, C.J., dissenting).

[148]*Id.* at 421. Indeed, adoption of the majority's viewpoint could lead to the conclusion that the "*Miranda*" cards distributed by the Marion County Sheriff's Department incompletely inform defendants of their rights.

[149]404 N.E.2d 1348 (Ind. 1980). These warnings were both oral and written.

[150]*Id.* at 1352.

[151]396 N.E.2d 365 (Ind. 1979).

[152]379 N.E.2d 987 (Ind. Ct. App. 1978).

[153]396 N.E.2d at 369. The trial court determines questions of admissibility of evidence obtained by means of a search warrant. No function is served by requiring the search warrant or probable cause affidavit to be viewed by the jury.

State.[154] The current rule serves to protect defendants from the prejudicial material often contained in the probable cause affidavit or search warrant.

E. Speedy Trial

In *Terry v. State*,[155] the court rejected a claim that a two and a half year delay between the filing of charges and subsequent arrest of the defendant violated his right to a speedy trial.[156] The defendant was formally charged with robbery in March 1975, and an arrest warrant was promptly issued. The defendant was not arrested, however, until November 1977, and spent the interim unaware that charges had been filed against him.

The majority, in analyzing the defendant's claim, relied on factors set out by the United States Supreme Court in *Barker v. Wingo*,[157] and ruled that the length of the delay was "of sufficient presumptive prejudice to trigger a *Barker* inquiry into the other factors."[158] Focusing particularly on whether the delay had injured Terry, the court held that the burden of demonstrating prejudice was on the defendant and that Terry had failed to show that he was actually prejudiced by the delay.[159]

The dissent, noting that none of the cases relied on by the majority involved situations analogous to Terry's, emphasized that the delay was due solely to the state's negligence in arresting Terry.[160] Moreover, the dissent emphasized that because of the nature of the delay, the defendant was unable to particularize the prejudice caused by the delay or to evaluate the evidence lost to him by the delay.[161] Indeed, the dissent's points are convincing. While the state was able to accumulate evidence almost immediately after the issuance of the arrest warrant, Terry spent the period unaware of the pending charges. Thus, at trial Terry had "no idea" where he was on the date of the robbery, and was unable to produce any exculpatory evidence.[162] Although a generalized claim of prejudice might be insuffi-

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[154]203 Ind. 291, 179 N.E. 916 (1932). In *Mata*, the court required the introduction into evidence of the search warrant under which items were seized if the state sought to introduce the items seized pursuant to the search.

[155]400 N.E.2d 1158 (Ind. Ct. App. 1980).

[156]U.S. CONST. amend. VI; IND. CONST. art. 1, § 12.

[157]407 U.S. 514 (1972). In *Barker*, the Court listed four relevant factors in evaluating whether a defendant has been deprived of his right to a speedy trial: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530.

[158]400 N.E.2d at 1160.

[159]*Id.* at 1161.

[160]*Id.* at 1164 (Staton, J., dissenting).

[161]*Id.*

[162]*Id.*

cient in challenging a lesser delay, the claim is extremely strong in *Terry* because of the great delay. Unfortunately, this issue was not thoroughly addressed by the majority.

In *Robinson v. State*,[163] the court ruled that under Criminal Rule 4(B)(1)[164] the defendant was "brought to trial" when the jury was impaneled. The court based its decision on *Crim v. State*,[165] a double jeopardy case, in which the court stated that a criminal trial before a jury commenced when the jury was selected and sworn. Accordingly, it was irrelevant that no evidence was presented until more than seventy days after the defendant's request for an early trial because the case was no longer controlled by Criminal Rule 4(B)(1).[166]

In *Back v. Starke Circuit Court*,[167] the court ruled that, for purposes of Criminal Rule 4(C),[168] when previously dismissed charges are refiled, the refiling is considered to have taken place on the day that the initial charges were filed.[169] The court also ruled that the relators were not obligated to undertake affirmative action to bring themselves to trial within the one year period set out in Criminal Rule 4(C), and, accordingly, they did not waive their rights under the Rule by their failure to object to their late trial date.[170]

In *Back*, the relators[171] were charged and arrested in September

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[163]389 N.E.2d 371 (Ind. Ct. App. 1979).

[164]IND. R. CR. P. 4(B)(1) provides in part:

> If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar. Provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as set forth in subdivision (A) of this rule.

[165]156 Ind. App. 66, 294 N.E.2d 822 (1973).

[166]389 N.E.2d at 374.

[167]390 N.E.2d 643 (Ind. 1979).

[168]IND. R. CR. P. 4(C) provides in part:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Any defendant so held shall, on motion, be discharged.

[169]390 N.E.2d at 644.

[170]*Id.* at 645.

[171]The relators were Marcel and Randy Back.

1976,[172] and obtained dismissal of the charges on October 28, 1977. On November 28, 1977 the state refiled the charges against the Backs, and in August 1978 a trial date was set.[173] The Backs obtained a continuance and on November 8, 1978 filed a motion for discharge for unnecessary delay pursuant to Criminal Rule 4(C). The court, quoting from *State ex rel. Hasch v. Johnson Circuit Court*,[174] noted that if "the identical charge is refiled, it must be regarded as if there had been no dismissal of the first affidavit, or as if the second affidavit had been filed on the date of the first."[175] The court, taking into consideration delays chargeable to the Backs, ruled that the one year period set forth in Criminal Rule 4(C) expired on November 28, 1977 as to Randy and on November 30, 1977 as to Marcel.[176]

In the portion of the opinion dealing with waiver, the court distinguished cases[177] in which the defendants remained silent and allowed the courts to set trials or pretrial conferences on dates beyond those required by Criminal Rule 4(B). The court stated that:

> We have never held that a defendant must take affirmative action to bring himself to trial, except under Ind. R. Crim. P. 4(B), if an early trial is desired. We have only held that he may not benefit from an error by the court when he was aware of the same, or by the exercise of due diligence should have been aware of it, at a time when it could have been averted and failed to object, thereby contributing to it.[178]

The court concluded that "[a] defendant is not required to take affirmative action to obtain a trial within the one year period set by C.R. 4(C)."[179]

There are two questionable aspects of the court's decision on the refiling issue. The first is the court's application of *Hasch*. *Hasch* in-

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[172]390 N.E.2d at 643. The Backs were charged on Sept. 21, 1976. Randy was arrested on Sept. 23, 1976, and Marcel was arrested on Sept. 25, 1976. The one year period under Criminal Rule 4(C) runs from the date the charge is filed *or* the date of a defendant's arrest, whichever is later. Therefore, the court's calculations for the Backs were based on the dates of their arrests.

[173]Trial was docketed for Nov. 2, 1978.

[174]234 Ind. 429, 127 N.E.2d 600 (1955).

[175]390 N.E.2d at 644 (quoting Hasch v. Johnson Circuit Court, 234 Ind. at 435, 127 N.E.2d at 602-03).

[176]*See* note 146 *supra*.

[177]390 N.E.2d at 644-45, wherein the court distinguished Utterback v. State, 261 Ind. 685, 310 N.E.2d 552 (1974) and State *ex rel.* Wernke v. Hendricks Superior Court, 264 Ind. 646, 348 N.E.2d 644 (1976).

[178]390 N.E.2d at 645.

[179]*Id.*

volved a state-instituted dismissal of charges, and the language relied on from *Hasch* was based on the possibility that the state would seek to circumvent speedy trial requirements by refiling charges that it had voluntarily dismissed. Thus, although reliance on *Hasch* may have been justified, a careful analysis of the differences between *Back* and *Hasch* and the relevance of *Hasch* to *Back* would have been appropriate. Instead, the court seems to have replaced analysis with quotations of facially appropriate language from *Hasch*.

Additionally, in calculating the Criminal Rule 4(C) one year period following the relators' arrests, the court did not exclude the period between the initial dismissal and the refiling of the charges. Although this period did not affect the outcome of this case, the court's failure to exclude this period could well affect a subsequent case. Moreover, the failure to exclude this period is not justified by *Hasch*, in which the court explicitly stated that "[t]he only exception [to the rule that refiling is considered to have occurred on the date of the initial filing] might be as to the intervening period between the dismissal and refiling of the charge—a question which we are not called upon to decide."[180] Thus, the court in *Back* should not have so blithely included the period between the dismissal and the refiling.

In *Pillars v. State*,[181] the court dealt with delays in the trial which are chargeable to the defendant under Criminal Rule 4(C).[182] The court held that a two week period during which the defendant's motion to withdraw was pending[183] "in no way affected the date upon which [the defendant's] trial could have been set."[184] The court also ruled that the defendant's initial failure to comply with a discovery order "should not have affected the setting of a trial date."[185] This conclusion was based on the observation that "[d]iscovery often continues until the time of trial; clearly, it need not be completed before the court sets a trial date."[186]

The court also held that Pillars did not waive his Criminal Rule 4(C) rights. The state's claim of waiver was based on the appellate court's calculation that a trial date should have been set by May 24, 1977; that on May 16, 1977 the trial court rescheduled the defendant's

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[180]234 Ind. at 435, 127 N.E.2d at 603.

[181]390 N.E.2d 679 (Ind. Ct. App. 1979).

[182]*See* note 168 *supra*.

[183]Counsel filed the motion to withdraw on Mar. 16, 1977. The motion was based on Pillars' failure to cooperate with counsel. A hearing on the motion was held on Apr. 1, 1977 and, following the hearing, the motion was denied. 390 N.E.2d at 680-81.

[184]*Id.* at 682.

[185]*Id.*

[186]*Id.*

trial for June 7, 1977; and that the defendant did not object to the rescheduling until May 26, 1977. Ruling that no waiver occurred, the court relied on Pillars' attorney's statement that, although the rescheduling occurred on May 16, he was unable to obtain a docket sheet until May 26 and therefore, was unable to ascertain that the trial date was in violation of Criminal Rule 4(C) until May 26.[187] The court also noted that because the improper rescheduling occurred so close to the May 24 deadline, it was unlikely that an earlier objection would have enabled the trial judge to reschedule the trial within the required period.[188]

The dissent contended that because the acts of counsel are deemed to be those of the defendant, there was a fifteen day delay, during which defense counsel's motion to withdraw was pending, which was chargeable to the defendant.[189] The dissent also argued that Pillars' failure to comply with the trial judge's discovery order caused a delay in the trial.[190] Moreover, the dissent pointed out that Pillars failed to make a timely objection to his trial date, arguing that, although Pillars' attorney did not obtain a docket sheet until May 26, he knew of the rescheduling before the May 24 deadline. Accordingly, an objection could have been made before the passage of the deadline.[191]

F. Conspiracy

The effect of changes in the penal code upon the law of conspiracy is reflected in *Archbold v. State*[192] and *Garcia v. State*.[193] In *Archbold*, the court held that the Indiana conspiracy statute at the time of the defendant's indictment[194] required "a meeting of at least two culpable minds before the offense [was] committed."[195] Under this "bilateral" theory of conspiracy, the defendant's conviction was

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[187]*Id.*

[188]*Id.* The court also discussed the impropriety of later delays in the trial. Although there were indications that later continuances were statutorily justified, the court noted that the record failed to indicate the reasons for the later delays. The court concluded with a reminder of the importance of docket entries to justify delays under Criminal Rule 4. *Id.* at 683.

[189]*Id.* at 686 (Hoffman, J., dissenting).

[190]*Id.*

[191]*Id.* at 686-87.

[192]397 N.E.2d 1071 (Ind. Ct. App. 1979).

[193]394 N.E.2d 106 (Ind. 1979).

[194]397 N.E.2d at 1073. The defendant's appeal was decided under IND. CODE § 35-1-111-1 (1976) (repealed 1977). Under this statute, punishable conduct occurred when "[a]ny person or persons . . . unite or combine with any other person or persons for the purpose of committing a felony."

[195]397 N.E.2d at 1072.

reversed because the sole named co-conspirator was a law enforcement officer feigning participation in the criminal enterprise.[196]

In *Garcia* the court interpreted the current Indiana conspiracy statute as being "unilateral" in nature.[197] Thus, although the only person with whom Garcia conspired was a law enforcement officer, her conviction was upheld.[198] The court relied primarily on the language of the statute in ruling that the legislature had indeed adopted the unilateral approach to conspiracy.[199] The court noted that the relevant statutory language was very similar to that of the Model Penal Code[200] and that the comments to the Model Penal Code

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[196]A dissenting opinion contended that the "unilateral" concept of conspiracy was "better-reasoned" and that nothing in the language of the statute mandated the majority's adoption of the "bilateral" theory. *Id.* at 1074-75 (Buchanan, C.J., dissenting).

[197]394 N.E.2d at 110. *See* IND. CODE § 35-41-5-2 (Supp. 1980). The statute provides that:

> (a) A person conspires to commit a felony when, with intent to commit the felony, he agrees with another person to commit the felony. A conspiracy to commit a felony is a felony of the same class as the underlying felony. However, a conspiracy to commit murder is a Class A felony.
>
> (b) The state must allege and prove that either the person or the person with whom he agreed performed an overt act in furtherance of the agreement.
>
> (c) It is no defense that the person with whom the accused person is alleged to have conspired:
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> (1) has not been prosecuted;
>
> (2) has not been convicted;
>
> (3) has been acquitted;
>
> (4) has been convicted of a different crime;
>
> (5) cannot be prosecuted for any reason; or
>
> (6) lacked the capacity to commit the crime.

[198]*See* 394 N.E.2d at 111.

[199]*Id.* at 109-10.

[200]*Id.* at 109-10 & n.3. MODEL PENAL CODE §§ 5.03, .04 (Tent. Draft No. 10, 1960). Section 5.03 states, in pertinent part, that:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Section 5.04 provides that:

> [I]t is immaterial to the liability of a person who solicits or conspires with another to commit a crime that:
>
> (a) he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic which is an element of such crime, if he believes that one of them does; or
>
> (b) the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.

explicitly adopted the unilateral theory.[201] The court further stated that the statute now explicitly provides that "'[i]t is no defense that the person with whom the accused person is alleged to have conspired . . . cannot be prosecuted for any reason.'"[202] The court interpreted this provision as clearly eliminating the defense, available under the bilateral concept, that an alleged co-conspirator lacked criminal culpability.[203]

G. Armed Robbery

In two recent opinions the Indiana Supreme Court discussed the number of robberies committed by a defendant during the course of a single "hold-up." In *Williams v. State*,[204] the defendant was convicted of four counts of armed robbery. Although the convictions were based on a single bank robbery, there were four separate convictions because the defendant approached four tellers and ordered each of them to put money into a pillowcase. On appeal, the Indiana Supreme Court held that "an individual who robs a business establishment, taking that business's money from four employees, can be convicted of only one count of armed robbery."[205]

The court's opinion was based primarily on the federal bank robbery statute[206] and several cases interpreting that statute.[207] The court noted that the relevant case law held that the statute prohibited *bank* robbery, that each occurrence constituted only one

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[201]394 N.E.2d at 108. *See* MODEL PENAL CODE § 503, at 105, Comment (Tent. Draft No. 10, 1966).

[202]394 N.E.2d at 109 (quoting IND. CODE § 35-41-5-2(c)(5) (Supp. 1980)).

[203]In ruling that the legislature had enacted a unilateral conspiracy statute, the court rejected Garcia's claim that the drafters did *not* intend to change the law. 394 N.E.2d at 109. Garcia's claim was based on the comment, made by the drafters, that "[a]s to what constitutes conspiracy or what amounts to conspiratorial agreement, the present law . . . is not sought to be changed." *Id.* at 110 n.4. INDIANA CRIMINAL LAW STUDY COMMISSION: PROPOSED FINAL DRAFT 70 (1974). The court interpreted this comment as referring to the "law relative to the offense, except for the elimination of the enumerated defenses." 394 N.E.2d at 110.

[204]395 N.E.2d 239 (Ind. 1979).

[205]*Id.* at 248-49. IND. CODE § 35-42-5-1 (1976 & Supp. 1980) provides:

> A person who knowingly or intentionally takes property from another person or from the presence of another person:
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> (1) by using or threatening the use of force on any person; or
>
> (2) by putting any person in fear;
>
> commits robbery, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon, and a Class A felony if it results in either bodily injury or serious bodily injury to any other person.

[206]18 U.S.C. § 2113 (1976).

[207]*E.g.*, United States v. Alexander, 471 F.2d 923 (D.C. Cir. 1972); United States v. Canty, 469 F.2d 114 (D.C. Cir. 1972).

bank robbery,[208] and that each robbery "constituted a unitary transaction"[209] or one offense. The court adopted this reasoning, that "the law involved [in the federal bank robbery cases] would be logically identical to that which is applicable when more than one employee hands over a single business's money or property to a robber."[210] Accordingly, the court ruled that Williams had committed only one robbery.[211]

The application of the *Williams* rationale was limited soon after its adoption. In *McKinley v. State*,[212] the defendant entered a drugstore which was operated as a sole proprietorship. After drawing a gun, McKinley ordered the store's cashier to give him the money from the cash register. He then robbed the store's proprietor of his personal wristwatch and of his wallet. Based on this incident the defendant was convicted of two counts of armed robbery. In a tersely worded opinion the Indiana Supreme Court rejected the defendant's claim that, under *Williams*, he had committed only one armed robbery.[213]

The court stated that if the defendant had taken the pharmacy's money from the employee and from the proprietor, *Williams* would indeed apply.[214] However, although the holding in *Williams* "was couched in terms of 'business establishment' and the 'business's money,'"[215] the holding did not require "that the business entity be a separate 'person' as is a corporation or partnership."[216] The court further reasoned that although the robbery of the business enterprise constituted one count of armed robbery, "[w]hen [the] petitioner relieved the store owner of his personal wristwatch and wallet, his actions took on a different character."[217] The court noted that although the defendant's actions harmed only one individual and, thus, only one legal entity, those actions wronged both the individual and his business.[218] This metaphysical distinction resulted in the defendant receiving *consecutive* sentences of ten and twenty

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[208]395 N.E.2d at 247 (quoting United States v. Canty, 469 F.2d 114, 126 (D.C. Cir. 1972).

[209]395 N.E.2d at 247 (quoting United States v. Hopkins, 464 F.2d 816, 823 (D.C. Cir. 1972).

[210]395 N.E.2d at 248.

[211]*Id.* at 248-49.

[212]400 N.E.2d at 1378 (Ind. 1980).

[213]*Id.* at 1379.

[214]*Id.*

[215]*Id.*

[216]*Id.*

[217]*Id.*

[218]*Id.*

years.[219] The court's opinion concluded that the "'basic reality'" of the robbery did not "'constitute a unitary transaction.'"[220]

The court's reasoning in *McKinley* is unconvincing. Although the *Williams* decision was couched in terms of taking the business's money, the focal point seemed to be that because the funds of only one entity were taken, only one armed robbery was committed. Applying this reasoning, McKinley robbed only one entity, the proprietor of the drugstore. The court, however, did not accept this analysis in deciding *McKinley*.

H. Sexually Explicit Materials

In *Ford v. State*,[221] the defendant was convicted of distributing obscene matter.[222] He contended that the Indiana obscenity statute[223] violated constitutional guarantees protecting free speech,[224] due process,[225] privacy,[226] and equal protection.[227] The court expended little effort in rejecting these claims, relying heavily on decisions of the United States Supreme Court which had previously dealt with many of the issues raised by Ford.

Ford's first amendment claim consisted of challenges to the state's ability to regulate sexually explicit materials, and to the breadth of the state's definition of "obscene matter."[228] Neither of

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[219]*Id.* at 1378. The opinion did not specify which sentence was based on the robbery of the proprietorship or which sentence was based on the robbery of the proprietor.

[220]*Id.* at 1379 (quoting United States v. Hopkins, 464 F.2d at 823.

[221]394 N.E.2d 250 (Ind. Ct. App. 1979).

[222]*Id.* at 251.

[223]IND. CODE §§ 35-30-10.1-1 to -8 (Supp. 1980). The defendant was arrested in 1975. Some language in the statute has since been amended. Any relevant difference between the current statute and the version evaluated by the court will be noted.

[224]U.S. CONST. amend. I.

[225]U.S. CONST. amend. V.

[226]In Stanley v. Georgia, 394 U.S. 557 (1969), the Court recognized that individuals have a constitutionally protected privacy interest in the personal possession of obscene materials. *See also* United States v. Reidel, 402 U.S. 351, 354-56 (1971).

[227]U.S. CONST. amend. XIV.

[228]IND. CODE § 35-30-10.1-1 (1976) states, *inter alia*, that

> (c) Any matter or performance is obscene if: (i) the average person, applying contemporary community standards, finds that the dominant theme of the matter or performance taken as a whole, appeals to the prurient interest in sex, and (ii) the matter or performance depicts or describes in a patently offensive way, sexual conduct, and (iii) the matter or performance, taken as a whole, lacks serious literary, artistic, political or scientific value.
>
> (d) "Sexual conduct" means (i) acts of actual sexual intercourse, or sodomy; or (ii) exhibition of the uncovered genitals in the context of masturbation or other actual sexual activity; or (iii) depiction of sado-masochistic abuse.

these claims was successful.[229] The Supreme Court has clearly established that "obscene" materials are outside the protection of the first amendment.[230] Additionally, the statute's definition of "obscenity" closely parallels the definition accepted by the Supreme Court as constitutionally adequate.[231]

Ford's second constitutional argument claimed that the Indiana obscenity statute was vague and thus violated his due process rights. He contended that the statute failed to give adequate warning of the conduct proscribed.[232] The court's response was a lengthy quote from *Roth v. United States*[233] in which the Supreme Court rejected a due process vagueness attack against a different obscenity statute.[234]

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[229]The court dealt with the latter claim by ruling that the statute was neither vague nor overbroad. Accordingly, the prohibition did not violate any of Ford's first amendment rights. This analysis appears to confuse the overbreadth doctrine of first amendment with the due process prohibition against vague statutes. The overbreadth doctrine requires that when the government enacts regulations which serve legitimate interests "it must do so by narrowly drawn regulations designed to serve those [legitimate] interests without unnecessarily interfering with First Amendment freedoms." Village of Schaumburg v. Citizens for a Better Environment, 100 S. Ct. 826, 836 (1980). By contrast, the prohibition against vague statutes is based on due process considerations because "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process." Conally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[230]Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).

[231]In Miller v. California, 413 U.S. 15 (1973), the Court stated:

> A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24-25 (citations omitted). Compare this language with the definition of obscene material found in IND. CODE § 35-30-10.1-1 (1976).

[232]Thus, the court found itself discussing the vagueness issue twice; first, in response to Ford's first amendment claims and second, in response to his due process claim. The vagueness analysis, however, was properly applicable only to Ford's due process claims. *See* note 229 *supra.*

[233]354 U.S. 476 (1957).

[234]The point of the excerpt from *Roth* was that statutes proscribing sexually explicit materials give constitutionally adequate warning of the conduct forbidden when such statutes are applied to a proper standard for judging obscenity. The Indiana court concluded that the legal definition of obscenity did not change with each indict-

Ford's next constitutional argument was that punishing the distribution of obscene materials to consenting adults was an invasion of the right to privacy, particularly since the Court in *Stanley v. Georgia*[235] held that the private ownership of obscene materials was constitutionally protected by the right to privacy.[236] The court rejected this claim[237] by relying on a Supreme Court decision rejecting a similar effort to expand the holding of *Stanley* beyond cases involving the private possession of obscene materials.[238]

Ford's final constitutional argument was that there was no rational basis for the various exemptions contained in the obscenity statute.[239] The court held that the statute involved neither a suspect class nor a fundamental right;[240] that a reasonableness test governed Ford's claims; and that he had failed to demonstrate that no rational basis existed for the different treatment extended to the exempted classes.

Ford also raised one non-constitutional argument. He claimed that the jury's verdict was not supported by substantial evidence because the prosecutor's proof that the magazine in question was indeed obscene consisted solely of the magazine. The court, relying on *Paris Adult Theatre I v. Slaton*,[241] ruled that the evidence was sufficient.[242] The court noted that "'hard core pornography . . . can and does speak for itself.'"[243]

As a result of the court's ruling on the sufficiency of the evidence, the state was required neither to present evidence of the relevant community standard nor to show how, under that standard, the material appealed to the prurient interest in sex. Yet, both the community standard and the appeal to the prurient interest in sex

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ment and that the definition gave adequate notice of the conduct proscribed. 394 N.E.2d at 254.

[235]394 U.S. 557 (1969).

[236]*Id.* at 568.

[237]394 N.E.2d at 255.

[238]The case relied on was United States v. Orito, 413 U.S. 139 (1973). In *Orito*, the Court upheld a conviction for transporting obscene materials in interstate commerce, ruling that *Stanley* did not extend beyond the privacy of the home. *See also* United States v. 12200-Ft. Reels of Film, 413 U.S. 123 (1973) (refusing to extend *Stanley* to the showing of obscene films to consenting adults in a commercial theatre); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (refusing to extend *Stanley* to the importing of obscene materials, even if for the private use of the importer).

[239]IND. CODE § 35-30-10.1-4(b) (1976) (repealed 1977). Institutions exempt from prosecution included, *inter alia*, schools, churches, and government agencies. No comparable exemption is currently found in the penal code.

[240]394 N.E.2d at 255. The court reasoned that because obscene material is unprotected by the first amendment, there was no fundamental free speech right involved.

[241]413 U.S. 49 (1973).

[242]394 N.E.2d at 252.

[243]*Id.* (quoting United States v. Wild, 422 F.2d 34, 36 (2d Cir. 1969)).

are portions of the statutory definition of obscene matter.[244] Thus, the state did not need to demonstrate specifically that the material in question met the statutory definition. Instead, the prosecutor presented the materials to the jurors and allowed them to evaluate, based upon their individual perceptions of the relevant community standard, whether the matter appealed to the prurient interest in sex. This procedure drew sharp criticism from the dissent.

The dissent contended[245] that neither the conduct proscribed nor the basis for proscription were adequately set forth in the statute. The dissent further noted that "the practical consequence of the statute is to create a community of the twelve [jurors whose] standards . . . largely determine *ex post facto* whether material is obscene."[246] In light of the majority's adherence to Supreme Court precedent, this complaint is directed both at the United States Supreme Court and at the *Ford* decision. Indeed, the Supreme Court has set up a legal framework in which criminally proscribed conduct is delineated by reference to a nebulously defined "relevant community standard." This standard is eventually given concrete form by a jury's verdict, too late to assist the defendant.[247] The Indiana appellate court, in its adoption of lengthy quotes from Supreme Court opinions, has done little to remedy this situation. Thus, as long as the current judicial approach to "spicy" materials continues, purveyors of such materials must continue to risk the jurors' reactions to the dealers' wares.

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[244]*See* IND. CODE § 35-30-10.1-1 (1976).

[245]394 N.E.2d at 256-58 (Garrard, J., dissenting).

[246]*Id.* at 258.

[247]*See, e.g.*, Jenkins v. Georgia, 418 U.S. 153 (1974) (reversing a finding that Academy Award nominee *Carnal Knowledge* was obscene). The appeals process, although available, is a limited and arduous means of vindicating one's rights. For further elaboration of the problems inherent in the Supreme Court's current framework for dealing with sexually explicit materials, *see* Smith v. United States, 431 U.S. 291, 311 (1977) (Stevens, J., dissenting); Note, *First Amendment—Obscenity*, 68 J. CRIM. L. & CRIMINOLOGY 613 (1977).

VIII. Decedents' Estates and Trusts

DEBRA A. FALENDER*

During the survey period in the area of wills and trusts, the significant cases[1] involved claims against decedents' estates, will contests, admissible evidence in a suit to enforce an alleged contract made by a decedent, final appealable judgments in probate proceedings, self-dealing by a fiduciary, res judicata, interpretation of a testamentary trust, and establishment of a purchase money resulting trust. It is interesting to note that most of the cases resolved procedural rather than substantive issues.

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[1]Only one section of the Probate Code was amended during the survey period. This amendment is discussed in the section on claims against decedents' estates. Interesting but insignificant cases will be mentioned in footnotes within the related topic. A few cases that do not fall within the listed topics are noted here. In Tekulve v. Turner, 391 N.E.2d 673 (Ind. Ct. App. 1979), and Marsch v. Lill, 396 N.E.2d 695 (Ind. Ct. App. 1979), the court of appeals held that Indiana's statutory provision regarding inheritance by illegitimate children from their intestate fathers, IND. CODE § 29-1-2-7 (1976), is clearly constitutional in light of the United States Supreme Court's opinion in Lalli v. Lalli, 439 U.S. 259 (1978), and the Indiana Supreme Court's opinion in Burnett v. Camden, 253 Ind. 354, 254 N.E.2d 199, *rehearing denied*, 253 Ind. 361, 255 N.E.2d 650, *cert. denied*, 399 U.S. 901 (1970). Recent cases bearing upon the constitutionality of Indiana's statutory requirements for inheritance by illegitimate children from their fathers have been discussed at length in previous survey articles. Barton, *Trusts and Decedents' Estates, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 423, 434 (1980); Falender, *Trusts and Decedents' Estates, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 330, 334-37 (1978). *Tekulve* and *Marsch* are noteworthy only because the Indiana courts have now stated the obvious.

The *Marsch* opinion, 396 N.E.2d at 696-99, also contains an interesting discussion of when attorneys' fees are payable out of estate assets. The trial court exceeded the discretion accorded it in IND. CODE § 29-1-1-20 (1976) when it allowed fees from the estate to an attorney after the attorney had begun direct representation of the interests of a known and identifiable prospective heir. The statute provides for compensation of attorneys out of estate assets only when they are appointed to represent "any interested person who is an incompetent or whose present name, existence, or residence upon diligent inquiry is unknown and cannot be ascertained." *Id.* § 29-1-1-20(a). Regarding attorneys' fees, *see also* the recent case of Wyneken v. Long, 400 N.E.2d 1147 (Ind. Ct. App. 1980), wherein the trial court properly denied a claim against a guardian for attorneys' fees. The attorney was aware that his client was under guardianship, but nonetheless performed services without first obtaining the approval of the guardian.

In Arnold v. Dirrim, 398 N.E.2d 442 (Ind. Ct. App. 1979), the court of appeals, in the course of upholding the trial court's finding of the defendants' intent to defraud plaintiff creditors, noted that a transfer to a spendthrift trust with a retained life interest is "indicative of fraudulent intent." *Id.* at 447.

A. Claims Against Decedents' Estates

During the 1980 legislative session, Indiana Code section 29-1-14-1, the nonclaim statute, was amended by adding the italicized language below:

> (a) All claims against a decedent's estate, other than expenses of administration and claims of the United States, and of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent, unless filed with the court in which such estate is being administered within:
> (1) five (5) months after the date of the first published notice to creditors; *or*
> (2) *three (3) months after the court has revoked probate of a will, in accordance with IC 29-1-7-21, if the claimant was named as a beneficiary in that revoked will;*
> *whichever is later.*[2]

The amended statute provides for a potentially extended claim-filing time if the claimant was a beneficiary under a contested will, the probate of which was revoked.[3] The three-month claim-filing period will apply, by its terms, regardless of the reason for the claimant-beneficiary's failure to file a claim within the five-month time period[4] and regardless of the fact that the claimant may share in the

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[2]IND. CODE § 29-1-14-1(a) (Supp. 1980). A similar change was made in subsection (c) of the section, which now provides:

> No claim shall be barred by the statute of limitations which was not barred thereby at the time of the decedent's death, if the claim shall be filed within:
> (1) five (5) months after the date of the first published notice to creditors; or
> (2) *three (3) months after the court has revoked probate of a will, in accordance with IC 29-1-7-21, if the claimant was named as a beneficiary in that revoked will;*
> *whichever is later.*

Id. § 29-1-14-1(c). The italicized language was added.

[3]The phrase "potentially extended" is used because if the probate of a will is revoked within two months after the first published notice to creditors, the claim-filing time of the claimant-beneficiary will not be extended beyond the five-month general time period.

[4]The reason for the claimant-beneficiary's failure to file a claim is immaterial in deciding whether the three-month period applies. The amendment undoubtedly was intended to protect a claimant-beneficiary who refrained from filing because the bequest or devise in the contested will satisfied the decedent's obligation to him or her. The amended statute, however, will "protect" any beneficiary of a successfully contested will who failed, for any reason, to file a claim within the five-month general time period.

decedent's estate as an heir or as a beneficiary under another valid will.[5]

Three questions come to mind regarding the effect of the amended nonclaim statute. First, how will the three-month provision affect the time period for filing the surviving spouse's election to take against the decedent's will?[6] Indiana Code section 29-1-3-2 provides that the election of a surviving spouse to take a forced share "must be made not later than ten (10) days after the expiration of the time limited for the filing of claims."[7] Section 29-1-3-2 also provides that if an action is pending to test the validity of a will, the surviving spouse may make an election within "thirty (30) days after the final determination of the litigation."[8] Will the surviving spouse be required to make an election within thirty days after the termination of litigation which results in revocation of probate of a will, or will the surviving spouse be entitled to elect within ten days after the expiration of the extended three-month claim-filing period?[9]

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[5]Thus, the amended statute may protect claimants who are in no way prejudiced by the revocation of probate of a will. Protection of those who are not prejudiced by revocation of probate should not be considered objectionable. Placing limitations on the applicability of the three-month provision would encourage expensive and time-consuming litigation whenever the applicability of the limitation was questionable. The simple, unqualified three-month provision is preferable to a more complicated provision even though a more complicated provision might be tailored to protect only those who are prejudiced by revocation of probate of a will.

[6]The elective share provisions are found in IND. CODE §§ 29-1-3-1 through -3-7 (1976 & Supp. 1980).

[7]IND. CODE § 29-1-3-2 (1976) provides in full:

> The election by a surviving spouse to take the share hereinbefore provided must be made not later than ten (10) days after the expiration of the time limited for the filing of claims; provided that if, at the expiration of such period for making the election, litigation is pending to test the validity or to determine the effect or construction of the will, or to determine the existence of issue surviving the deceased, or to determine any other matter of law or fact which would affect the amount of the share to be received by the surviving spouse, the right of such surviving spouse to make an election shall not be barred until the expiration of thirty [30] days after the final determination of the litigation.

[8]*Id.*

[9]If the spouse is devised property under the will, the devise may or may not abate for the payment of creditor's claims, depending on the classification of the devise as specific, general, or residual, and depending on the intent of the testator. *See* IND. CODE § 29-1-17-3 (1976) regarding the order of abatement. The surviving spouse will ordinarily need to know the amount of claims filed against the estate, and consequently the extent of abatement, in order to make an intelligent decision to elect to take against the will. Thus, the first-stated rule of § 29-1-3-2 gives the spouse ten days after the claim-filing period to make an intelligent choice. *See* text at note 7 *supra*. The proviso in § 29-1-3-2 would only lengthen the elective share filing period under the original nonclaim statute: The proviso would allow the spouse an additional thirty days after the termination of any litigation "which would affect the amount of the share to

Second, will the three-month claim-filing period apply when a successful collateral attack has been made upon the validity of a probated will? Ordinarily, a will contest must be filed within five months after a will is offered for probate.[10] In *Estate of Cameron v. Kuster*,[11] the court of appeals held that a collateral attack, after the five-month contest period, is proper when the will, on its face, clearly violates the execution requirements of the Probate Code.[12] Will the three-month claim-filing period apply when a *Kuster* collateral attack results in revocation of probate of a will?[13] Certainly, applying the three-month period in the event of a *Kuster* collateral attack is within the spirit of the recently amended nonclaim provision.[14]

Third, will the three-month period only if probate of a will is successfully revoked or also if probate of a will is initially refused? The Probate Code distinguishes between revocation of probate and refusal of probate,[15] and apparently section 29-1-14-1 maintains the

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be received by the surviving spouse." IND. CODE § 29-1-3-2 (1976). In some cases, the new three-month period for filing creditor's claims will reverse the effect of the proviso in § 29-1-3-2: Whenever litigation results in revocation of probate of a will, the election-filing period may be shortened, by literal application of the proviso, to thirty days after termination of the litigation instead of ten days after the new three-month claim-filing period. Such a literal application of § 29-1-3-2 would mean that the spouse may be forced to decide to elect or not before that spouse knows of all the claims against the decedent's estate.

If § 29-1-3-2 is not amended to clarify its relationship to § 29-1-14-1, the courts should construe § 29-1-3-2 to always allow the spouse ten days after the expiration of the claim-filing time (either the five-month or the three-month period) to give full effect to the legislative intent that the spouse be afforded an opportunity to make an intelligent decision to elect or not.

[10]IND. CODE § 29-1-7-17 (1976 & Supp. 1980).

[11]142 Ind. App. 645, 236 N.E.2d 626 (1968), discussed at notes 56-58 *infra* and accompanying text.

[12]*Id.* at 652, 263 N.E.2d at 628-29. In *Kuster*, an unsigned and unattested codicil had been admitted to probate. Objections were filed and allowed after the five-month will contest period.

[13]The three-month nonclaim provision specifically refers to a revocation of probate pursuant to § 29-1-7-21, which provides in full: "If such determination be against the validity of such will or the competency of the proof, the court shall refuse or revoke the probate thereof; but if it be in favor of the validity and due execution of such will, probate thereof shall be admitted or ratified." The language of § 29-1-7-21 is broad enough to encompass a determination to revoke probate made after a *Kuster* collateral attack.

[14]See notes 4-5 *supra*. A claimant-beneficiary is prejudiced by not filing a claim in reliance on the validity of a bequest or devise in any will regardless of the reason for or the time of revocation of probate of that will.

[15]IND. CODE § 29-1-7-13(a) provides:

> When a will is offered for probate, if the court finds that the testator is dead and that the will was executed in all respects according to law, it shall be admitted to probate as the last will of the deceased, unless objections are filed as provided in section [29-1-7-16].

distinction by its reference to revocation of probate and its omission of any reference to refusal of probate.[16]

In two cases decided during the survey period, the pre-amendment nonclaim provision barred the claims of the creditors. In *Rising Sun State Bank v. Fessler*,[17] a doctor sued the personal representatives to recover for medical services rendered to two decedents. The doctor's suit was filed in a court that did not have probate jurisdiction.[18] The trial court rendered a judgment in favor of the doctor, but the court of appeals reversed, holding that the doctor was precluded from recovering against these personal representatives because of his failure to comply with section 29-1-14-1.[19]

Section 29-1-7-16 provides for the filing of objections before the will is admitted. If objections to probate are properly filed before the will is admitted to probate, then "[w]hen and if such will is thereafter offered for probate, it shall be impounded by the clerk, copied in the will record and its probate continued for thirty (30) days." IND. CODE § 29-1-7-16 (1976). The will will be admitted to probate "[i]f an action to resist the probate of such will is not commenced, as provided in section [29-1-7-17], within this time . . . ." *Id.* Thus, there are two distinct courses of events. By one, a will is admitted to probate, and then if a will contest is successful, the probate of the will is *revoked*. By the other, a will is objected to before it is admitted to probate, and then if an action to *resist* probate is successful, the probate of the will is *refused*. Section 29-1-7-17 maintains the distinction by providing: "Any interested person may contest the validity of any will or resist the probate thereof . . . ." IND. CODE § 29-1-7-17 (1976). Section 29-1-7-20 refers specifically to the two distinct procedures: "In any suit to resist the probate, or to test the validity of any will after probate . . . ." *Id.* § 29-1-7-20. Section 29-1-7-21, reprinted in full at note 13 *supra*, also distinguishes between refusal and revocation of probate. *Id.* § 29-1-7-21.

[16]The reference to revocation of probate and not to refusal of probate in the amended nonclaim statute may have been inadvertent. The only real distinction between resisting probate and contesting probate is the time when objections to the validity of a will are filed with the court. Why should the mere timing of filing objections to validity affect the applicability of the three-month claim-filing period? Arguably, a claimant-beneficiary may rely more justifiably on the validity of an admitted will than on the validity of an impounded will. Thus, perhaps the legislature intended that claimant-beneficiaries of wills whose probate is resisted should not be allowed the additional three months in which to file a claim.

[17]400 N.E.2d 1164 (Ind. Ct. App. 1980).

[18]The doctor sued the personal representatives in the Ohio County Court, which had no jurisdiction over probate matters. IND. CODE §§ 33-4-4-3, 33-10.5-3-2 (1976). The estate was being administered in the Ohio Circuit Court.

[19]The appellate court decision does not indicate when the doctor's lawsuit was filed. If the lawsuit was filed beyond the five-month time limit of § 29-1-14-1, then the appellate court's decision to reverse was correct: A party "cannot seek to 'revive' a claim which should have been filed against a decedent's estate by bringing an action against the executor or administrator" after the filing period has run. 400 N.E.2d at 1166. If, however, the lawsuit was filed within the five-month time limit, albeit in the wrong court and not as part of the probate proceeding, the trial court's judgment for the doctor might have been affirmed by recognition of the principles embodied in IND. R. TR. P. 75(B) and the case of State *ex rel.* Townsend v. Tipton Circuit Court, 242 Ind. 226, 177 N.E.2d 590 (1961). In *Townsend*, a will contest was filed in the court where

In *Anson v. Estate of Anson*,[20] the creditor was a legatee and, as such, by statute was entitled to a mailed copy of the published notice to creditors to file claims against the decedent's estate.[21] The creditor-legatee's notice of publication was not mailed until nearly six months after the notice to creditors was published,[22] and the

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the estate was being administered. The will contest was given a civil cause number, but the trial court changed the cause number to the number of the estate proceeding filed in the same court. The Indiana Supreme Court held that nothing prevents this sort of renumbering, "so long as the rights of the parties are not prejudiced thereby in the trial of the merits of the action or defense." *Id.* at 231, 177 N.E.2d at 593. The Indiana Supreme Court also stated:

> Actions to contest or resist the probate of a will are statutory. Although they have in many respects the characteristics of a civil action, they are also at the same time connected with the estate proceedings. Even though they may proceed as a separate action on the civil side of a court, the estate proceedings in the probate side of the court must take cognizance of and judicial notice of the rulings and ultimate determination of the so-called "civil action" to contest the validity or resist the probate of the will. The same situation exists with reference to claims against an estate placed on the trial docket.

Id. at 229-30, 177 N.E.2d at 592.

In *Fessler*, the doctor's lawsuit was not filed in the court with jurisdiction over the estate proceeding. *See* note 18 *supra*. Therefore, more than merely renumbering the cause of action was required to validate the doctor's claim. IND. R. TR. P. 75(B) provides the vehicle for considering the doctor's claim as filed in the proper court. The rule provides:

> Whenever a claim or proceeding is filed which should properly have been filed in another court of this state, and proper objection is made, the court in which such action or proceeding is filed shall not dismiss the same, but shall order said cause transferred to the court in which it should have been filed. The person filing such claim or proceeding shall pay such costs as are chargeable upon a change of venue and the papers and records shall be certified to the court of transfer in like manner as upon change of venue. Such action shall be deemed commenced as of the date of filing the claim in the original court.

Thus, if the doctor's lawsuit had been filed within the five-month claim-filing period, even though in the wrong court, the suit should have been transferred to the court with probate jurisdiction. Then, by the *Townsend* rationale, the court with probate jurisdiction should have taken judicial notice of the civil action "so long as the rights of the parties are not prejudiced thereby in the trial of the action or defense." 242 Ind. at 231, 177 N.E.2d at 593. If the doctor's lawsuit was filed, and summons served, so that the personal representatives were notified of the claim within the five-month claim-filing period, it seems that no rights would have been prejudiced by correcting the filing error.

[20]399 N.E.2d 432 (Ind. Ct. App. 1980).

[21]IND. CODE § 29-1-7-7 (1976) provides in part: "A copy of [the published] notice shall also be served by ordinary mail on each heir, devisee and legatee whose name and address is set forth in the petition for probate or letters . . . ."

[22]There is a strong suggestion of unfair play in the facts of the case. The appellant was a child of the decedent and a residuary trust legatee, but his residuary trust interest (and his entire interest in his father's estate) was only one dollar. The dece-

creditor-legatee did not file his claim until nearly ten months after the first published notice to creditors. The creditor-legatee argued that the estate should be estopped from denying his claim because he relied to his detriment on receiving personal notice of publication as a legatee. The court of appeals, quoting from a 1962 case, rejected this argument:

> The rule of waiver or estoppel has no application to a nonclaim statute. . . . [T]he time element in a nonclaim is a part of the right of action itself and is not a defense. Such statutes are not extended by the disability, fraud or misconduct of the parties. The time to act cannot be waived by the parties or lengthened by the court.[23]

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dent's widow received one-half of the estate outright, and the decedent's other children and grandchildren shared the corpus of the trust of the other one-half of the property. The personal representative was the decedent's widow. The original petition for probate did not list the names and addresses of any of the residuary trust legatees, all of whom were the decedent's children and grandchildren. Thus, when the notice to creditors was first published on September 23, 1975, since no names and addresses of legatees were "set forth in the petition for probate," IND. CODE § 29-1-7-7 (1976), no mailed notices were sent to the legatees. Not until March 19, 1976, nearly six months after the first published notice, did the personal representative file an amended petition for probate which included the names and addresses of the trust legatees, and not until March 19, 1976, were mailed copies of the notice to creditors sent to these residuary legatees.

IND. CODE § 29-1-7-5(2) (1976) provides that a petition for probate shall state "the name, age and place of residence of each legatee and devisee, in the event the decedent left a will, so far as such are known or can with reasonable diligence be ascertained by the personal representative." It would be logical to assume that the decedent's widow, acting as personal representative, could have ascertained with reasonable diligence the names and addresses of the decedent's children and grandchildren (the residuary trust legatees) in time to include them in the original petition for probate or at least shortly thereafter. Yet the personal representative waited six months to comply with § 29-1-7-5(2). Interestingly, in September 1975, the time limit for filing claims was six months after the first published notice to creditors, *id.* § 29-1-14-1(a) (amended to five months effective January 1, 1976), and the time limit for filing a will contest was six months after the will was offered for probate, *id.* § 29-1-7-17 (amended to five months effective January 1, 1976). The will was admitted to probate on September 19, 1975, exactly six months before the amended petition with names and addresses was filed. The timing, coupled with the fact that the appellant was effectively cut out of decedent's estate, leads one to suspect that the appellant was intentionally kept in the dark.

[23]399 N.E.2d at 435 (quoting Donella v. Crady, 135 Ind. App. 60, 63, 185 N.E.2d 623, 625 (1962)). This position may seem harsh to creditors, especially if fraud or disability has prevented them from timely filing, but it must be remembered that the purpose of the nonclaim statute is to promote the expeditious distribution of claim-free property. 399 N.E.2d at 436. Creditors may not sleep on their rights or rely on assurances of others that their rights will be protected regardless of their compliance with the statutory procedures.

The creditor-legatee in *Anson* also argued that compliance with the personal notice requirement is required for the commencement of the running of the nonclaim statute. This argument was answered by reference to a 1959 case, which decided the same question adversely to the claimant.[24] Thus, the court of appeals affirmed the trial court's dismissal of the claim as untimely filed.[25]

The most significant "claim" case during the survey period was *In re Estate of Williams*.[26] In *Williams*, the plaintiff corporation sought enforcement of a corporate stock buy-sell agreement[27] against the estate of a deceased shareholder. The plaintiff filed its "Petition for an Order Directing Executrix to Perform an Agreement" nearly one year after the first published notice to creditors.[28] The court of appeals held that the nonclaim statute, section 29-1-14-1, did not apply, because the obligation sought to be enforced by the plaintiff (to sell to the corporation any shares of stock of the corporation that the decedent owned at death) was not "'a debt or demand of a pecuniary nature which could have been enforced against the decedent in his lifetime and could have been reduced to a simple money judgment.'"[29] The court of appeals, however, held that Indiana Code section 29-1-14-21 did prevent enforcement of the buy-sell agreement in the estate proceeding.[30] Section 29-1-14-21 provides:

> When any person claims any interest in any property in the possession of the personal representative adverse to the estate, he may file, prior to the expiration of five (5) months after the date of the first published notice to creditors, a petition with the court having jurisdiction of the estate setting out the facts concerning such interest, and thereupon the court shall cause such notice to be given to such parties as it deems proper, and the case shall be set for trial and tried as in ordinary civil actions.[31]

The court of appeals held that section 29-1-14-21 "requires a person who claims an interest in the property in the possession of the personal representative to file a petition within five months after the first published notice if that person wishes to resolve the issue

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[24]Lewis v. Smith's Estate, 130 Ind. App. 390, 162 N.E.2d 457 (1959).

[25]399 N.E.2d at 437.

[26]398 N.E.2d 1368 (Ind. Ct. App. 1980).

[27]A controversy over the proper construction of the agreement was not resolved by the court. *Id.* at 1370 n.1.

[28]*Id.* at 1369. At the time, the claim-filing period was five months after the first published notice to creditors.

[29]*Id.* at 1370 (quoting Vonderahe v. Artman, 128 Ind. App. 381, 387, 146 N.E.2d 822, 825 (1958) (defining "claim")).

[30]398 N.E.2d at 1371.

[31]IND. CODE § 29-1-14-21 (1976).

as a part of the estate proceeding."[32] The court emphasized that the five-month time period in section 29-1-14-21 only bars assertion of the adverse interest "as a part of the estate proceeding."[33] The interest asserted is not "forever barred" by failure to file within five months,[34] but the interest apparently may be asserted only against the decedent's successor in interest if not filed within five months.[35]

The corporation made several arguments as to the inapplicability of section 29-1-14-21, but these arguments did not persuade the appellate court.[36] The corporation argued that the stock was not in the possession of the personal representative because application of the doctrine of equitable conversion left the estate with only an action to collect the agreed purchase price.[37] The court of appeals might have soundly rejected the applicability of the doctrine of equitable conversion in a purchase and sale of personal property.[38] Instead, the court merely stated that the authorities cited by the corporation were not on point.[39]

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[32]398 N.E.2d at 1371. In another statement of this same holding, the court italicized the words "as a part of the estate proceeding." *Id.*

[33]*Id.* The court, therefore, gave effect to the permissive language of the statute, which states "that a person 'may' file rather than 'shall' file." *Id.*

[34]The "forever barred" language of IND. CODE § 29-1-14-1 (Supp. 1980) is not used in *id.* § 29-1-14-21. The absence of the "forever barred" language is consistent with the permissive language of *id.* § 29-1-14-21, *See* note 33 *supra.*

[35]In *Williams*, then, the corporation could assert the enforceability of the buy-sell agreement against the heirs or devisees who succeed to the deceased shareholder's interest in the stock. The decedent's obligations under the buy-sell agreement are restrictions attached to the stock and should be enforceable against anyone who is not a bona fide purchaser for value.

[36]398 N.E.2d at 1370-71.

[37]*Id.* The doctrine of equitable conversion is based on the availability of the equitable remedy of specific performance of real estate contracts. Equity treats as done those things that ought to be done and, thus, treats the purchaser of land as the equitable owner of real estate and the seller of land as the owner of the unpaid purchase money.

[38]The continued viability of the equitable conversion doctrine in real estate contracts is unquestioned. *See, e.g.*, J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 146-54 (2d ed. 1975). There is no sound reason for extending this questionable doctrine into the personal property area.

[39]398 N.E.2d at 1371. The Indiana authorities cited involved real estate contracts. A Missouri case was cited which supports the theory of equitable conversion in personal property contracts, Strumberg v. Mercantile Trust Co., 367 S.W.2d 535 (Mo. 1963), but the Indiana court merely distinguished the Missouri case from the *Williams* case on the basis that Missouri had no statute similar to IND. CODE § 29-1-14-21 (1976).

Another part of the corporation's argument was that the interest of the corporation was not adverse to that of the estate because enforcement of the buy-sell agreement involved merely an exchange of stock for cash. The court responded in a footnote: "Liquidity, however, is not always the primary goal in estate administration. Ancillary advantages or benefits may emanate from possession of the stock. These would be lost if the stock were exchanged for cash." 398 N.E.2d at 1370 n.2.

The corporation also argued: "'If the rule were that interests under executory sale and purchase agreements, such as that involved here, were within IC 29-1-14-21, the executor could be deprived of a beneficial bargain by the simple neglect of the purchaser to file any claim.'"[40] The court, after pointing out that the case cited in support of the argument did not refer to section 29-1-14-21, concluded, with no explanation, that the corporation's "argument is not persuasive."[41] The court might have clarified its opinion had it pointed out (1) that the personal representative could sue to enforce a beneficial bargain even if the other party did not comply with sections 29-1-14-21, and (2) that apparently the "claimant" may assert his interest dehors the estate proceeding, directly against the successors to the property subject to the interest.[42]

It is submitted that if an interest in property is asserted beyond the five-month filing period of section 29-1-14-21, the personal representative should be allowed, and in certain circumstances required, to litigate the issue as part of the estate proceeding—to assure proper distribution of the estate and to protect the decedent's heirs and legatees from subsequent litigation. For example, in *Williams*, those who succeed to the decedent's interest in the stock will find that they have succeeded also to litigation over the enforceability of the buy-sell agreement. The enforceability of the buy-sell agreement will affect the value of the successors' interests in the stock, and litigation costs may reduce substantially the value of the successors' shares. It is submitted that the successors in interest should be able to require the personal representative to litigate the issue as part of the estate proceeding, if they desire,[43] and the personal representative should be permitted to litigate the issue if the personal representative is willing to do so.[44] It is, however, impossible to tell whether the appellate court would accept a construction of the per-

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[40]398 N.E.2d at 1371.

[41]*Id.*

[42]*See* note 35 *supra* and accompanying text.

[43]The *Williams* court stated that its construction of § 29-1-14-21 of the Indiana Code "simply promotes the expeditious conclusion of estate proceedings." 398 N.E.2d at 1371. The statute, however, if it is strictly construed to absolutely prevent litigation of the issues raised by petitioners who claim an interest in property in the personal representative's possession, will not promote the interests of decedent's successors. Distribution of the estate may be expedited, but the distributees will also receive an unwanted lawsuit. Most distributees would probably want litigable issues to be resolved before distribution, even if distribution were delayed somewhat.

[44]Ordinarily, litigation over conflicting interests in property in the possession of the personal representative, being administered as estate property, would always be more efficiently and appropriately conducted by the personal representative at the expense of the estate.

missive language of section 29-1-14-21 which would permit flexibility in the application of the five-month time period.

B. Will Contests

The appellants in two will contest cases appeared to be grasping for grounds for appeal. In *Munster v. Marcrum*,[45] the appellants-contestants, relying on the testimony of the attesting witnesses, contended that there was no evidence showing that the testatrix had published and properly signed her will.[46] The witnesses' testimony, however, was contradicted by the attestation clause included in the will and read by both witnesses[47] and was contradicted by a verified affidavit signed by one of the witnesses when the will was offered for probate.[48] The court of appeals held that the attestation clause and the affidavit served as evidence to support the jury's verdict of the will's validity.[49]

The inclusion of an attestation clause will always aid the proponents of a will, as in the *Munster* case, if the clause is proved to have been read by or to the witnesses at the time of execution of

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[45]393 N.E.2d 256 (Ind. Ct. App. 1979).

[46]The two attesting witnesses testified that the testatrix's signature was on the will when they gathered to attest it, and that the testatrix did not acknowledge the signature in their presence, or expressly signify to them that the instrument was her will, as required by IND. CODE § 29-1-5-3(a)(1)(ii) (1976 & Supp. 1980). The contestants had the burden of proving invalidity of the will, *id.* § 29-1-7-20, and were therefore appealing a negative judgment. It should be noted that the witnesses testified that the testatrix and the witnesses were present, and the testatrix did not object, when her husband referred to two instruments as "'our wills.'" 393 N.E.2d at 257. This acquiesced-in statement of testatrix's husband probably satisfies the publication requirement, as interpreted in Arnold v. Parry, 363 N.E.2d 1055 (Ind. Ct. App. 1977), discussed in Falender, *Decedent's Estates and Trusts, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 142 (1979).

[47]The attestation clause stated, in part, that the "'instrument was signed, published and declared by said [testatrix], as and for her Last Will and Testament, in our presence, and in the presence of each of us . . . .'" 393 N.E.2d at 257.

[48]The affidavit stated that the testatrix "'signified that such instrument was his/her Last Will and Testament, and duly executed same, in the presence of the subscribing witnesses thereto . . . .'" *Id.* at 258.

[49]*Id.* The court noted that the contestants' "attempt to argue to this court that the attestation clause from the will and the affidavit should not be considered as substantive evidence for various reasons." *Id.* at 258 n.2. The court then stated that, because contestants introduced the will and affidavit into evidence, they could not "challenge the use of these exhibits as substantive evidence." *Id.* This points up a Catch-22 for will contestants. The contestants could not successfully contest a will's validity without introducing that will into evidence. Yet, the moment the contestants introduce a will with an attestation clause, they cannot complain when the clause is used as substantive evidence of the will's validity. Of course, the clause must be proved to have been read to or by the witnesses in order to serve as any evidence that the recited acts occurred. *See* note 50 *infra*.

the will.[50] In another recent case, *Modlin v. Riggle*,[51] it is evident that the absence of an attestation clause has no effect on the validity of a will, because an attestation clause is not required for due execution.[52] The contestant-appellant in *Modlin* filed an action to set aside probate of a will more than five months after the will was admitted to probate.[53] The contestant attempted to avoid the jurisdictional bar of the five-month time limitation for contesting a will by asserting that, when the will witnesses are unavailable to testify as to the facts of due execution, the absence of both an attestation clause and a self-proving provision[54] is a defect on the face of the will "clearly showing its nontestamentary character."[55] Thus, the contestant argued, a collateral attack upon the judgment admitting the will to probate is permissible within the doctrine of *Estate of Cameron v. Kuster*,[56] which allowed a collateral attack when the will admitted to probate "was *on its face* clearly violative of our Probate Code."[57] In *Modlin*, the court of appeals held that the absence of an attestation clause and a self-proving provision did not render the instrument admitted to probate in any way irregular on its face so as to bring the case within the *Kuster* doctrine.[58]

C. *Evidence*

The court of appeals in *In re Estate of Voelker*,[59] considered the issue of whether unsigned wills in the possession of a decedent's attorney are protected under the attorney-client privilege. The plaintiff in *Voelker*, seeking specific performance of the decedent's alleged promise to convey certain real and personal property, requested a discovery order for copies of any of the decedent's unsigned wills.

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[50]If the clause is not read by or to the witnesses, it has no effect either as substantive evidence or as a means to impeach the contradictory testimony of the witnesses at trial. *See generally* Severns, *The True Function of the Attestation Clause in a Will*, 11 CHI.-KENT L. REV. 11 (1932).

[51]399 N.E.2d 767 (Ind. Ct. App. 1980).

[52]*Id.* at 770.

[53]IND. CODE § 29-1-7-17 (1976) provides that a will contest must be filed within five months after a will is offered for probate. In *Modlin*, the record did not reveal when the will was offered for probate, but obviously it was offered before or on the same day it was admitted to probate. It is interesting to note that no one is entitled to notice that a will has been offered or admitted to probate. *Id.* § 29-1-7-4(d).

[54]*Id.* § 29-1-5-3(b) (1976 & Supp. 1980).

[55]399 N.E.2d at 768.

[56]142 Ind. App. 645, 236 N.E.2d 626 (1968).

[57]399 N.E.2d at 770 (emphasis in original). The *Kuster* codicil was unsigned and unattested. *See* notes 12-13 *supra*.

[58]399 N.E.2d at 770. *Accord*, Brown v. Gardner, 159 Ind. App. 586, 308 N.E.2d 424 (1974); Wilkinson v. Ritzman, 158 Ind. App. 186, 301 N.E.2d 847 (1973).

[59]396 N.E.2d 398 (Ind. Ct. App. 1979).

The trial court granted the order. The court of appeals reversed the discovery order, holding that the unsigned wills were protected by the attorney-client privilege.[60] Although the attorney-client privilege is "waived or terminated by operation of law" when a will is executed, the same is not true when "the metamorphosis from mere pages of writing to the status of a will was never achieved."[61] The attorney-client privilege may, however, be waived by the decedent's personal representative, heirs, or legatees.[62]

D. Final Appealable Judgments

In *In re Estate of Garwood*,[63] one of the decedent's heirs filed a petition to set aside a contract for the sale of estate property, which contract had been entered into after the decedent's death between one of two co-executors, individually, and the two co-executors on behalf of the estate.[64] After a hearing, the trial court entered a judgment declaring the contract valid and enforceable. The objecting heirs appealed by filing a motion to correct errors. The court of appeals,[65] *sua sponte*, dismissed the appeal on the ground that the trial court's decision was not a final appealable judgment, but was an interlocutory order, the appeal of which was not timely filed.[66] The supreme court, on transfer, vacated the decision of the court of appeals and held that the trial court's judgment was a final appealable judgment.[67] A final judgment "'is one which determines the rights of

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[60]*Id.* The court of appeals quoted from Coleman v. Heidenreich, 381 N.E.2d 866 (Ind. 1978), where the supreme court held: "'[W]hen an attorney is consulted on business within the scope of his profession, the communications on the subject between him and his client should be treated as strictly confidential.'" 396 N.E.2d at 398.

[61]396 N.E.2d at 399.

[62]*See* Haverstick v. Banet, 267 Ind. 351, 357, 370 N.E.2d 341, 344 (Ind. 1977), *discussed in* Falender, *Trusts and Decedents' Estates, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 330, 333-34 (1978).

[63]400 N.E.2d 758 (Ind. 1980).

[64]One ground for objection was that the purchase price was less than the amount of a bid of one of the heirs; however, there is no information in the facts of the case about this alleged bid. The facts do indicate that the property was appraised at $92,200, but sold to the co-executor for $92,001. *Id.* at 759. Another ground for objection was the self-dealing of the co-executor; this is discussed in the following section.

[65]*In re* Estate of Garwood, 382 N.E.2d 1020 (Ind. Ct. App. 1978), *noted in* Barton, *Trusts and Decedents' Estates, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 423 n.1 (1980). No question was raised by the parties whether the trial court's ruling was an interlocutory order or a final appealable judgment.

[66]An appeal from an interlocutory order must be filed within thirty days after the trial court's ruling on the order. IND. R. APP. P. 3(B). All other appeals must be filed within ninety days "from the date of the judgment or the ruling on the motion to correct errors, whichever is later." *Id.*

[67]The court of appeals had relied on cases holding that orders for the sale of real estate to make assets available for the payment of liabilities are interlocutory orders.

the parties in the suit, or a distinct and definite branch of it, and reserves no further question or direction for further determination.'"[68] The judgment here was final because the merits of the entire case on the issue of the enforceability of the contract were before the trial court, the rights of the parties in and to the real estate were fully and finally determined by the trial court's order, the trial court reserved no power to deny the validity of the sale, and the issue of the sale would never come before the trial court again.[69]

E. Self-dealing by a Fiduciary

After finding that the appeal was timely filed, the *Garwood* court considered the issues of the case on the merits and stated: "The question of the validity of the sale of estate property by the personal representative to himself was decided by this court as early as 1859."[70] A fiduciary "'cannot put himself in a situation where it becomes his interest that the property should bring the least sum.'"[71] The sale by the fiduciary to himself will be set aside, without proof that the fiduciary has made an advantageous bargain.[72]

The supreme court noted that the cases relied upon by the court of appeals were inapposite, because the sale and order in the case at hand were not made to pay liabilities of the estate. 400 N.E.2d at 760-61.

[68]*Id.* at 761 (quoting Zumpfe v. Piccadilly Realty Co., 214 Ind. 282, 287, 13 N.E.2d 715, 717 (1938)). Later in the opinion, the *Garwood* court quoted the case of Inheritance Tax Div. v. Estate of Calloway, 232 Ind. 1, 8, 110 N.E.2d 903, 906 (1953): "'The distinction between an order and a judgment is one of finality, and the question is whether the order is a final determination of the rights of [the] parties.'" 400 N.E.2d at 762.

In Geib v. Estate of Geib, 395 N.E.2d 336 (Ind. Ct. App. 1979), decided during the survey period, the court of appeals held that denial of a petition to revoke letters improvidently issued is a final appealable judgment. The supreme court had held, in Meyer v. Anderson Banking Co., 243 Ind. 145, 177 N.E.2d 662 (1961), that a judgment removing an administrator is a final appealable judgment. In *Geib*, the court of appeals stated: "What is at stake in a petition to revoke letters improvidently issued is closely analogous to what is at stake in a petition to remove an administrator and, consequently, the former is also a final, appealable judgment." 395 N.E.2d at 337.

[69]400 N.E.2d at 761.

[70]*Id.* at 762.

[71]*Id.* at 763 (quoting Martin v. Wyncoop, 12 Ind. 266, 268 (1859)).

[72]400 N.E.2d at 763. The *Garwood* court quoted Potter v. Smith, 36 Ind. 231, 239 (1871):

> "The cestui que trust is not bound to prove, nor is the court bound to decide, that a trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. There may be fraud, and yet the party not be able to show it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the cestui que trust to come at his own option, and, without showing essential injury, to in-

F. Res Judicata

Because courts handling probate matters in Indiana are courts of general jurisdiction,[73] litigants must be careful to litigate all issues raised in petitions in probate proceedings in order to avoid a later defense of res judicata. *Blake v. Blake*[74] illustrates the danger. James Blake died intestate, survived by his wife Patricia, two sons, and two daughters. James died as the result of a gunshot wound inflicted by his wife, who later pled guilty to involuntary manslaughter. During the course of administration of James' estate, the administrator filed a pleading asking the probate court[75] to determine the title to parcels of real property held by James and Patricia as tenants by the entireties. Shortly after the administrator filed the petition in the probate court, James' son and daughter filed a complaint in the superior civil court,[76] asking that court to impose a constructive trust on property held by James and Patricia as tenants by the entireties.[77] The son and daughter subsequently ap-

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sist upon having the experiment of another sale."
400 N.E.2d at 763.

[73]*See* IND. CODE § 33-4-4-3 (1976) for jurisdiction of circuit courts, which handle probate matters in counties where a superior court with probate jurisdiction has not been organized. *See id.* tit. 33, art. 5 for jurisdiction of organized superior courts.

[74]391 N.E.2d 848 (Ind. Ct. App. 1979).

[75]At the time this pleading was filed, the Madison County Superior Court, No. 1, herein referred to as the "probate court," "had general jurisdiction, concurrent with the Circuit Court, in all civil and probate matters." *Id.* at 850 n.2. *See* IND. CODE § 33-5-33-6 (1971) (repealed effective February 24, 1976). During the course of the litigation, the Madison County Superior Courts, Nos. 1 and 2, were restructured into one Superior Court with three judges. After the restructuring, the superior court had the same general, concurrent probate and civil jurisdiction as Superior Court, No. 1, had before the restructuring. *Id.* § 33-5-33.1-4 (1976).

[76]This complaint was originally filed in Madison County Superior Court, No. 2, which is herein referred to as the "superior civil court." During the course of the litigation, this court was abolished in the restructuring described in note 75 *supra*. The jurisdiction of Madison County Superior Court, No. 2, was established in IND. CODE § 33-5-34-3 (1971) (repealed effective February 24, 1976).

[77]Upon James' death, legal title to the entire tenancy by entireties property remained in Patricia as the surviving co-tenant. The heirs contended that Patricia should hold all or part of the property as a constructive trustee for their benefit, to prevent her unjust enrichment from the wrongful act of killing her co-owner husband. According to National City Bank v. Bledsoe, 237 Ind. 130, 144 N.E.2d 710 (1957), a constructive trust will be imposed for the benefit of the deceased co-tenant's estate (and through the estate to the decedent's creditors and successors other than the slayer) on one-half of the property upon clear and convincing proof that the surviving tenant by the entireties intentionally caused the co-tenant's death. The trust is imposed on one-half the property because the intentional killing is said to work a severance of the entireties relationship into a tenancy in common. The fact that Patricia pled guilty to involuntary manslaughter does not preclude a showing of intentional killing in the constructive trust proceeding.

peared in the probate court and contended that the probate court did not have jurisdiction to decide the administrator's petition.[78] They explained to the probate court that they had filed a complaint in the superior civil court, and they asked the probate court to "refuse to determine any interests in said real property until such time as it may be judged that any of said real property falls within the jurisdiction of the estate."[79] The son and daughter chose not to pursue their constructive trust claim in the probate court.[80] On March 25, 1976, the probate court rendered a judgment that Patricia, James' surviving spouse, was "'entitled to . . . all right, title and interest in and to said real property.'"[81] Later, the judge in the superior civil court dismissed the son and daughter's complaint for a constructive trust on the grounds that the probate court judgment was res judicata. The daughter appealed that dismissal.

The court of appeals upheld the superior civil court's dismissal of the action.[82] The issue before the probate court was the same issue presented to the superior civil court, namely, whether the widow's fee simple legal title was subject to an equitable claim on the part of the decedent's heirs.[83] The probate court had subject matter jurisdiction of this issue,[84] and the probate court rendered a

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[78]The basis of their contention was that the tenancy by the entireties property did not pass into the deceased co-tenant's estate and would not be administered as part of the estate proceeding.

[79]391 N.E.2d at 852 n.4 (quoting the "Surviving Children's Petition to Remove the Determination of Interests in Real Property and to Remove the Administrator").

[80]They did not appear in the probate court on the date set for a hearing on the administrator's petition, though they were afforded "full opportunity to be heard." 391 N.E.2d at 854.

[81]*Id.* at 850.

[82]*Id.* at 855.

[83]The court of appeals noted that the issue was more "succinctly" presented in the heirs' complaint. *Id.* at 853. Nonetheless, both the administrator's petition and the heirs' complaint stated that Patricia held legal titles as the surviving tenant by the entireties. *Id.* The court found, therefore, that the administrator's "mention of a controversy in the widow's interest could only refer to the possible adverse interest in the heirs who claimed equitable title." *Id.* In any event, even "if the surviving children's claim was not actually identifiable as an issue in the administrator's petition, it surely would be a compulsory counterclaim." *Id.* Unasserted compulsory counterclaims are barred in subsequent actions if the other elements of res judicata are present. *Id.* (citing Middelkamp v. Hanewich, 364 N.E.2d 1024, 1034 (Ind. Ct. App. 1977)).

[84]Subject matter jurisdiction is the power to entertain the class of cases to which the controversy belongs. *See generally* State *ex rel.* Dean v. Tipton Circuit Court, 242 Ind. 642, 181 N.E.2d 230 (1962); State *ex rel.* Johnson v. Reeves, 234 Ind. 225, 125 N.E.2d 794 (1955). Lack of subject matter jurisdiction cannot be waived. Probate courts in Indiana have general subject matter jurisdiction. *See* note 73 *supra*. Jurisdiction of the particular case is the power to entertain the precise action before the court. Improper venue is one form of lack of jurisdiction of the particular case. *See* State *ex rel.* Dean v. Tipton Circuit Court, 242 Ind. 642, 181 N.E.2d 230 (1962). Failure to comply with statutory prerequisites may mean that jurisdiction of the particular case is lack-

decision on the merits[85] after affording the parties adequate opportunity for presentation of their case. Thus, all the elements of the res judicata defense were present.[86]

The decision of the son and daughter to pursue their constructive trust claim only in the superior civil court was definitely a devastating tactical error. Because the probate court had the power to decide the question of the heirs' equitable interest in the entireties property, the children should not have ignored the probate court proceeding. The assertion by the probate court of jurisdiction of the particular case should have been appealed if the children thought it was erroneous. In the absence of an appeal, the question of improper jurisdiction of the particular case was waived.[87]

G. Interpretation of Trust Terms

In *In re Geake*,[88] the testator left the residue of his estate in trust, with certain of his relatives as income beneficiaries. The trust provided for a disposition of the trust corpus to the Indiana Masonic Home and the Shriners Hospital for Crippled Children in the event that the testator's wife and son should predecease him or in the event that his son should predecease his wife. The trust, however,

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ing. *See* State *ex rel.* Johnson v. Reeves, 234 Ind. 225, 125 N.E.2d 794 (1955). Jurisdiction of the particular case may be waived. *Id.*

[85]The court of appeals noted that the question for application of the res judicata defense is whether the prior decision was "on the merits, rather than whether the issues were fully litigated." 391 N.E.2d at 855. The probate court's decision was on the merits, not on a procedural basis.

[86]The court of appeals quoted Wright v. Kinnard, 147 Ind. App. 484, 488, 262 N.E.2d 196, 199-200 (1970), for a statement of the elements of the res judicata defense:

> "The basic elements of res judicata are fourfold: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the matter now in issue was, or might have been, determined in the former suit; (3) the particular controversy adjudicated in the former action must have been between the parties to the present suit; and (4) judgment in the former suit must have been rendered on the merits . . . ."

391 N.E.2d at 851 (also citing subsequent other cases which quoted the same passage from the *Wright* case).

[87]The children probably would not have succeeded in contesting the probate court's jurisdiction of the particular case. In spite of statements in the *Blake* opinion indicating that "any interest in the estate of in the property was contingent upon a finding of some title held by the heirs," 391 N.E.2d at 853, according to National City Bank v. Bledsoe, 237 Ind. 130, 144 N.E.2d 710 (1957), the estate of the slain co-tenant is apparently the "beneficiary" of the constructive trust, so that unpaid creditors of the decedent would have the first claim to the constructive trust property. Absent creditors' claims, the heirs of the decedent (other than the slayer) are the ultimate beneficiaries, but apparently the estate will serve as the conduit for distributing the heirs' shares. Thus, the personal representative is specifically authorized by IND. CODE § 29-1-13-10 (1976) to petition the probate court for an adjudication of the alleged beneficial interest of the estate in the property.

[88]398 N.E.2d 1375 (Ind. Ct. App. 1980).

did not provide for disposition of the corpus in the event that the testator's wife survived him but predeceased his son, and, in fact, the testator's wife did survive him and did predecease his son. The trial court determined that, because the trust failed to specify a beneficiary under the circumstances that actually occurred, a resulting trust should be imposed for the benefit of the testator's son, Robert.[89]

A resulting trust for the benefit of the settlor's successors is properly imposed when an express gratuitous trust fails for lack of an identifiable beneficiary.[90] The trial court in *Geake* apparently read the trust terms literally and determined that no beneficiary was named to take the corpus under the circumstances that occurred. The court of appeals, however, found an implied intent on the part of the settlor-testator to benefit the Home and Hospital under all contingencies.[91] The court of appeals therefore reversed the trial court's judgment and held that the Home and Hospital were the intended remainder beneficiaries of the trust.[92] The testator's intent was undoubtedly promoted by this decision. Unfortunately, the time and money spent in litigation could have been avoided by more careful drafting of the testamentary trust.

H. Purchase Money Resulting Trusts

In *Criss v. Bitzegaio*,[93] the plaintiff brought an action to impose a resulting trust upon real estate located in Indiana. The trial court

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[89]Robert was the testator's only heir-at-law.

[90]When an express gratuitous trust fails, the trust corpus can either be returned to the settlor (or, if he is dead, to his successors) by way of a resulting trust or be retained by the trustee for his own benefit. The logical choice of returning the property to the settlor is explained in G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 75, at 282 (5th ed. 1973):

> [T]he settlor usually intends the trustee to get no advantage from the trust except his compensation. Usually the only defensible result is to return the property to the settlor or his successors, either on the theory that he would have intended that action if he had thought of the question, or on the basis of fair play and justice. Surely no one other than the settlor has any equitable or moral claim to the property, assuming that he has not provided in the trust instrument his intent for a different disposition of the property.

[91]398 N.E.2d at 1378. The court of appeals applied familiar rules of testamentary construction. The court looked to the will as a whole to determine the intention of the testator and was willing to "give effect to an intention or purpose indicated by implication where the express language of the entire will manifests such an intent and the testator has simply neglected to provide for the exact contingency which occurred." *Id.* The testator's "general scheme or design to benefit [his] relatives during their lives and thereafter to distribute the corpus to the Home and Hospital" prevailed over a literal reading of the trust terms. *Id.*

[92]*Id.* at 1378-79.

[93]402 N.E.2d 1279 (Ind. Ct. App. 1980).

granted the plaintiff's motion for summary judgment and ordered the defendants to convey to the plaintiff an undivided one-third interest in the property. The majority of the court of appeals, over a well-reasoned dissent, reversed the grant of summary judgment and directed that judgment be entered for the defendants.[94]

Criss and Swango purchased the real property at a tax sale in 1949. Each paid one-half of the purchase price. The plaintiff alleged, however, that Criss and Swango purchased the property "'with the understanding that plaintiff would repay to each the said Criss and Swango one-sixth of the purchase price and when said amounts were paid, Criss and Swango would convey to Plaintiff a one-third interest in the real estate.'"[95] This alleged understanding was the basis of the plaintiff's resulting trust argument.

A resulting trust arises by implication of law in three situations in the United States today: (1) When an express trust fails for any reason,[96] (2) when there has been full performance of the trust without exhausting the trust principle, and (3) when one person pays the purchase money for a conveyance of property to another.[97] The *Criss* case involved the third type of resulting trust, the so-called purchase money resulting trust.[98] By statute in Indiana, a purchase money resulting trust may be imposed "[w]hen a conveyance for a valuable consideration is made to one (1) person, and the consideration therefor [*sic*] paid by another,"[99] where

> it shall be made to appear that, by agreement, and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase-money or some part thereof.[100]

The purchase money must be supplied, or an absolute obligation to pay it incurred, before or as part of the original purchase transac-

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[94]*Id.* at 1282.

[95]*Id.* at 1281 (quoting plaintiff's pleadings). Criss died in 1960 without having conveyed any interest in the real estate to the plaintiff. The defendants in the case were Swango and the children of Criss.

[96]*See* note 90 *supra*.

[97]*See generally* G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS §§ 71-76 (5th ed. 1973); 5 A. SCOTT, THE LAW OF TRUSTS § 404.1 (3d ed. 1967) (*quoted in* Melloh v. Gladis, 261 Ind. 647, 655, 309 N.E.2d 433, 438 (1974)).

[98]402 N.E.2d at 1280.

[99]IND. CODE § 30-1-9-6 (1976).

[100]*Id.* § 30-1-9-8. This statute, combined with § 30-1-9-6, reverses the common law presumption that a resulting trust arises when one person pays the purchase money for a conveyance to another. In Indiana, the agreement to hold for the payor is not presumed but must be affirmatively shown.

tion.[101] The agreement must be for valuable consideration and must be entered into before title to the property is acquired.[102]

After Criss and Swango acquired the real estate in 1949, the plaintiff paid one-third of the taxes and insurance on the property, spent money for maintenance and improvements, and paid abstract fees and costs of purchasing an easement.[103] These expenditures, however, could not serve as consideration[104] to support the alleged agreement of Criss and Swango to hold one-third of the land for one plaintiff, because the expenditures were made by the plaintiff long after Criss and Swango acquired title.

The alleged "understanding" that the plaintiff would pay Criss and Swango a total of one-third of the purchase price, according to the court of appeals, "falls far short of an absolute obligation to pay which would support a resulting trust."[105] The court reasoned that, even if a promise to pay for the land had been made by the plaintiff, the Statute of Frauds[106] would have prevented enforcement of the plaintiff's promise by Criss and Swango.[107]

The dissenting judge took issue with the majority's reversal of

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[101]402 N.E.2d at 1281 (citing, *e.g.*, Auten v. Sevier, 136 Ind. App. 434, 202 N.E.2d 274 (1964); Schwab v. Schwab, 130 Ind. App. 108, 162 N.E.2d 329 (1959); Boyer v. Leas, 116 Ind. App. 502, 64 N.E.2d 38 (1946); Rickes v. Rickes, 81 Ind. App. 533, 141 N.E. 486 (1923)).

[102]402 N.E.2d at 1281 (citing Auten v. Sevier, 136 Ind. App. 434, 202 N.E.2d 274 (1964)). Although the consideration requirement is frequently discussed in a way that makes it appear to be separate and distinct from the requirement that one party furnish the purchase money for the conveyance of land to another, whenever one party has furnished the purchase money, or has incurred an absolute obligation to pay it, the consideration requirement will always be fulfilled. The purchase money, or the obligation to furnish it, will serve as consideration for the agreement of the grantee to hold the property for the party paying for the conveyance. Furthermore, the conveyance itself should serve as consideration for the grantee's promise to hold the property for the payor.

[103]In addition, at an unspecified time, Criss and Swango allegedly agreed to allow the plaintiff a credit for one-third of the receipts from farming operations on the property. Apparently, after considering all the expenditures made by the plaintiff and after taking into account the alleged credit, the plaintiff only owed $39.76 in 1960. 402 N.E.2d at 1281.

[104]*See* note 102 *supra*.

[105]402 N.E.2d at 1281.

[106]IND. CODE § 32-2-1-1 (1976). *See* discussion at note 113 *infra*.

[107]402 N.E.2d at 1281. The court quoted from cases from other jurisdictions, namely, Nettles v. Doss, 161 S.W.2d 138 (Tex. Civ. App. 1942) and Gunstone v. Walker, 157 Wash. 475, 289 P. 53 (1930), to support its conclusion that an unenforceable oral agreement to pay the transferee a part of the purchase price after the conveyance to the transferee does not support a resulting trust in favor of the one who, in fact, contributed nothing, and was not bound to contribute anything, to payment of the purchase price. 402 N.E.2d at 1282.

summary judgment for the plaintiff.[108] The dissenting judge pointed out that the counter-affidavit filed by defendants Criss did not raise "a genuine issue of material fact in opposition to Bitzegaio's [plaintiff's] theory of resulting trust."[109] Therefore, the facts in the plaintiff's affidavit must be deemed admitted,[110] and "we must accept as true Bitzegaio's [plaintiff's] averment that the agreement represented his obligation to pay."[111] The majority, according to the dissenting judge, erroneously raised a factual issue to reverse the judgment.[112]

The dissenting judge's position seems logical: If the plaintiff averred his unconditional obligation to pay, and if the defendants did not controvert this averment in any way, then the appellate court should not have questioned the existence of the requisite "obligation." The majority's position, however, is more sound. The majority found that an obligation to pay did not exist because the Statute of Frauds would have prevented enforcement of the obligation by the obligees Criss and Swango.[113] The ultimate difference between the majority and the dissent is that the majority is unwilling to ignore the fact that the plaintiff's averment showed an agreement to repay that was entirely oral and within the Statute of Frauds at the time it was made. The majority would put the burden of overcoming the apparent Statute of Frauds problem on the plaintiff, whose burden it is to show payment of the purchase price, or the assumption of an *absolute* obligation to pay, in order to fall within the statutory purchase money resulting trust category.

The dissenting judge also took issue with the majority's conclusion that summary judgment should be granted in favor of the defendants:

> The majority have ordered that judgment be entered for defendants. This is wrong. Not only have they erred by raising a factual issue to overthrow the judgment, they have

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[108]402 N.E.2d at 1282-83 (Young, J., dissenting). Swango did not appeal, so the summary judgment entered against him stood, and the plaintiff therefore owned one-sixth of the real estate by virtue of this judgment.

[109]*Id.* at 1282. Plaintiff's affidavit explained the alleged understanding. Nothing in the counter-affidavit contravened plaintiff's affidavit. *Id.*

[110]*Id.* at 1283 (citing Carvey v. Indiana Nat'l Bank, 374 N.E.2d 1173, 1174 n.1 (Ind. Ct. App. 1978)).

[111]402 N.E.2d at 1283. The dissenting judge reasoned that the existence or not of plaintiff's absolute obligation to pay was a question of fact depending on the intent of the parties, and "the failure of the defendants to have demonstrated a genuine issue at the trial level now bars them from attacking the judgment on appeal on the ground that there is a genuine issue of material fact." *Id.* (citing Batchelder v. Haxby, 167 Ind. App. 82, 337 N.E.2d 887 (1975)).

[112]402 N.E.2d at 1283-84.

[113]*See* notes 106-07 *supra* and accompanying text.

> compounded the error by resolving this fact issue against Bitzegaio [plaintiff] and in favor of defendants. A more palatable position would be to remand for further proceedings so that at least Bitzegaio [plaintiff] has an opportunity to resolve this issue in his favor.[114]

In fact, a remand for further proceedings would have been the only palatable solution in light of the fact that the entry of summary judgment in favor of defendants is a final judgment on the merits.[115] The doctrine of res judicata will preclude the plaintiff's assertion of any issues that were or might have been litigated in the present action.[116]

One issue that might have been litigated is the issue of the imposition of a constructive trust on one-third of the property on the basis of the fraud or constructive fraud of Criss and Swango.[117] At the very least, a constructive trust might have been asserted to the extent of the monies plaintiff expended on taxes, insurance, maintenance, and improvements on the property, to prevent the unjust enrichment of Criss and Swango at the plaintiff's expense. Although the court of appeals correctly concluded that the plaintiff was not entitled to summary judgment declaring a purchase money resulting trust in his favor, the court's direction that summary judgment be entered in favor of the defendants is, in essence, a conclusion that a purchase money resulting trust was the only device available to protect the plaintiff under the facts alleged. The Indiana Supreme Court, however, has emphatically warned against a clear-cut separation of resulting and constructive trusts:

> *The label attached to the instant trust should not be determinative. Both resulting and constructive trusts are creatures of equity, imposed to do justice. This area is too overlapping, confused and ill-defined for the Court of Appeals to rely solely on the fact that the trial court labeled*

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[114]402 N.E.2d at 1284.

[115]*See, e.g.*, England v. Dana Corp., 147 Ind. App. 279, 259 N.E.2d 433 (1970).

[116]*See* note 86 *supra*.

[117]In Melloh v. Gladis, 261 Ind. 647, 656, 309 N.E.2d 433, 438-39 (1974), the court quoted 5 A. SCOTT, *supra* note 97, § 404.2, regarding constructive trusts:

> A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. The duty to convey the property may rise because it was acquired through fraud, duress, undue influence or mistake, or through a breach of a fiduciary duty, or through the wrongful disposition of another's property. The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it.

> *the trust "resulting," and deem it to be controlled by IC 30-1-9-6 through 30-1-9-8. It would be preferable and do more justice to the law if it were merely deemed to be, and treated as, a constructive trust as alleged in Mary's complaint.*[118]

Although the plaintiff in Criss apparently did not use any label other than the resulting trust label in his pleadings and motions, the court of appeals has not done justice if there are, as there appear to be, facts alleged by the plaintiff which might justify the imposition of a constructive trust in his favor.

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[118]Melloh v. Gladis, 261 Ind. at 656-57, 309 N.E.2d at 439 (emphasis in original).

IX. Domestic Relations

HELEN GARFIELD*

A. Adoption

1. Consent.—The predominant consideration in any adoption proceeding is the best interests of the child. Where the child's interests conflict with the interests of the natural parents, or of the agency handling the adoption, the child's interests necessarily prevail. In two well-reasoned opinions,[1] the Indiana Court of Appeals reviewed the consent requirements of the Indiana adoption statute[2] and held that the power of a parent or an agency to prevent adoption of a child by withholding consent is limited by the interests of the child.

In re Adoption of Infant Hewitt[3] dealt with a natural mother's attempt to withdraw her consent to the adoption of her child. The mother signed the consent on the day that she was released from the hospital, two days after her child was born. A petition to adopt the child was filed the same day.[4] Ten days later, the mother filed a petition to withdraw her consent; the trial court denied her petition and granted the petition of the adoptive parents. The court of appeals affirmed, upholding the constitutionality of the consent provisions of the adoption statute and refusing to disturb the trial court's denial of the mother's petition to withdraw consent.[5]

The mother's constitutional argument was that the adoption statute was deficient because it failed to require either appointment of legal counsel or a judicial hearing before a natural parent could give irrevocable consent to an adoption. She argued that the state's failure to provide these safeguards to assure the voluntariness of her consent resulted in a violation of her fundamental right to raise her child. The court of appeals conceded that the fourteenth amendment protects the right of parents to raise their children free from

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[1]*In re* Adoption of Infant Hewitt, 396 N.E.2d 938 (Ind. Ct. App. 1979); Stout v. Tippecanoe County Dep't of Pub. Welfare, 395 N.E.2d 444 (Ind. Ct. App. 1979).

[2]IND. CODE § 31-3-1-6 (1976). The consent provisions were amended by Act of Mar. 10, 1978, Pub. L. No. 136, § 28, 1978 Ind. Acts 1196, 1272 (codified at IND. CODE § 31-3-1-6 (Supp. 1980)). Both *Hewitt* and *Stout* were decided under the statute as it existed prior to the 1978 amendments.

[3]396 N.E.2d 938 (Ind. Ct. App. 1979).

[4]The prospective adoptive parents received temporary custody of the infant on the day their petition was filed. *Id.* at 939.

[5]*Id.* at 941-43.

undue interference by the state[6] but found no state interference in the Indiana statute which permits, but does not require, a parent to consent to the adoption of his or her child.[7] The failure of the statute to provide additional safeguards in the form of counsel and hearing did not transform a permissive statute into an unconstitutional interference with parental rights. The court found that parental rights are adequately protected by Indiana cases holding that a consent to adoption, like any other contract, may be invalidated if found to be tainted by fraud, duress, or other forms of overreaching[8] and by the statutory provision permitting consent to be withdrawn at any time prior to the final decree of adoption if withdrawal is in the best interest of the child.[9] There was no evidence that the consent in *Hewitt* was executed under fraud or duress, and the trial court found that the mother was not acting in the best interests of the child in seeking to withdraw her consent.[10]

In *Stout v. Tippecanoe County Department of Public Welfare*,[11] the trial court denied a petition for adoption because the welfare department refused to consent to the adoption or to place the child in the petitioners' home. The court of appeals reversed, holding that neither the welfare department's consent nor its placement of the child in the prospective adoptive home was an absolute prerequisite to adoption.[12] The ultimate responsibility for the decision to grant an adoption must rest with the trial court, based upon the best interests of the child.[13] The court of appeals therefore reversed the summary judgment granted in favor of the welfare department and remanded the case to the trial court to determine whether the department had unreasonably withheld its consent.[14]

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[6]The early United States Supreme Court cases enunciating such parental rights as part of the liberty protected by the due process clause of the fourteenth amendment dealt with parents' rights to make decisions concerning their children's education. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). These cases were the foundation of the right of privacy first articulated in Griswold v. Connecticut, 381 U.S. 479 (1965). More recent decisions have recognized that "the interest of a parent in the companionship, care, custody, and management of his or her children" is entitled to constitutional protection. Stanley v. Illinois, 405 U.S. 645, 651 (1972). *See also* Caban v. Mohammed, 441 U.S. 380 (1979) (upholding the equal protection right of a natural father to prevent adoption of his children by withholding consent).

[7]396 N.E.2d at 940.

[8]Emmons v. Dinelli, 235 Ind. 249, 133 N.E.2d 56 (1955); Rhodes v. Shirley, 234 Ind. 587, 129 N.E.2d 60 (1955).

[9]IND. CODE § 31-3-1-6(f) (1976) (amended 1978).

[10]396 N.E.2d at 942.

[11]395 N.E.2d 444 (Ind. Ct. App. 1979).

[12]*Id.* at 451-52.

[13]*Id.* at 450-51.

[14]*Id.* at 452-53.

The Indiana adoption statute requires written consent to adoption by "any person, agency, or county department of public welfare having lawful custody of the child whose adoption is being sought."[15] The consent of such an agency, or of any nonparent, can be dispensed with, however, if the court finds that consent is being unreasonably withheld.[16] When the trial court declined to rule on the reasonableness of the department's refusal to consent, in effect, it granted the adoption agency greater rights than those of a natural parent.[17] "To grant the Department unbridled discretion in withholding its consent to adoption would elevate the Department to a status preferred over that of even a natural parent, a result we think the legislature did not intend."[18] The court of appeals cautioned, however, that in determining the child's best interests on remand, the trial court must consider the fact that the child had been living with the adoptive parents chosen by the Welfare Department during the preceding three years. Even if the trial court now determined that the welfare department had been unreasonable in withholding consent to the child's adoption by the Stouts, the child's adjustment to living with the adoptive parents chosen by the department must weigh heavily in determining the child's present best interests.[19]

The petitioners in *Stout* joined the child's foster parents in a federal suit attacking the constitutionality of the welfare department's removal of the child from the foster parents' home. In *Kyees*

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[15]IND. CODE § 31-3-1-6(a)(3) (Supp. 1980).

[16]*Id.* § 31-3-1-6(g)(6). The statute provides:

(g) Consent to adoption is not required of:

. . . .

(6) any legal guardian or lawful custodian of the person to be adopted other than a parent who has failed to respond in writing to a request for consent for a period of sixty (60) days or who, after examination of his written reasons for withholding consent, is found by the court to be unreasonably withholding his consent.

[17]Despite the protected status accorded parental rights, *see* note 6 *supra* and accompanying text, there are circumstances in which the adoption court can dispense with parental consent. These include abandonment, termination or voluntary relinquishment of parental rights and incompetency. IND. CODE § 31-3-1-6(g)(1)-(5),(7),(8) (1976) (amended 1978). The current version of the statute contains a somewhat different statement of the grounds for dispensing with parental consent. *See id.* § 31-3-1-6(g)(1)-(5) (Supp. 1980).

[18]395 N.E.2d at 449. The court of appeals cited several decisions from other jurisdictions interpreting similar statutes to require court review of agency decisions to withhold consent. *E.g.*, Stines v. Vaughn, 23 Ill. App. 3d 511, 319 N.E.2d 561 (1974); State *ex rel.* Portage County Welfare Dep't v. Summers, 38 Ohio St. 2d 144, 311 N.E.2d 6 (1974); State *ex rel.* Department of Insts. v. Griffis, 545 P.2d 763 (Okla. 1975).

[19]395 N.E.2d at 453 n.14 (quoting Unwed Father v. Unwed Mother, 379 N.E.2d 467, 472 (Ind. Ct. App. 1978) ("Unfortunately, the best interest of the child in this case may also have been thwarted")).

v. County Department of Public Welfare,[20] the Court of Appeals for the Seventh Circuit affirmed the district court's grant of summary judgment to the defendants, holding that the foster parents had no constitutional right to continuation of a relationship with the child which was clearly temporary in nature.[21]

2. Addendum on Unwed Fathers.—In the 1979 Survey of Indiana Domestic Relations Law,[22] the author of this Article erroneously discussed section 6(g)(6) of the Indiana adoption statute[23] in connection with the withholding of consent by the father of an illegitimate child. This section, discussed and interpreted by the court of appeals in *Stout*, allows the adoption court to dispense with the consent of a guardian or custodian "other than a parent" if it finds that consent is being unreasonably withheld.[24] It has no application to a parent, including the father of an illegitimate child "whose paternity has been established by a court proceeding."[25] Such a father would acquire veto power over his child's adoption under the statute, even though he may not be constitutionally entitled to it.[26] On the other hand, the Indiana statute does not require the consent of a natural father whose paternity has not been adjudicated,[27] but such a father may nevertheless have a constitutional right to veto his child's adoption if he has taken an active part in the child's upbringing. There are discrepancies between Indiana's statutory standard and the constitutional standard for the father's veto rights which may prove troublesome in future cases.

In *Caban v. Mohammed*,[28] the United States Supreme Court drew a distinction between a father who "never has come forward to participate in the rearing of his child,"[29] who may be denied "the privilege of vetoing the adoption of that child,"[30] and an unwed father who has "manifested a significant paternal interest in the child,"[31] who is entitled to the same veto right as an unwed mother.[32]

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[20]600 F.2d 693 (7th Cir. 1979).

[21]*Id.* at 698-99.

[22]Garfield, *Domestic Relations, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 215, 217-18 (1980).

[23]IND. CODE § 31-3-1-6(g)(6) (Supp. 1980).

[24]*Id.*

[25]*Id.* § 31-3-1-6(a)(2).

[26]*See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979), discussed *infra*, notes 28-32 and accompanying text.

[27]IND. CODE § 31-3-1-6(g)(2) (Supp. 1980).

[28]441 U.S. 380 (1979).

[29]*Id.* at 392.

[30]*Id.*

[31]*Id.* at 394.

[32]The Court held that to deny such a father the veto privilege accorded to unwed mothers would result in a gender-based classification which would violate the equal

Under *Caban*, the Indiana statute could not constitutionally be applied to dispense with the consent of an unwed father who had participated in the rearing of his children. More troublesome, however, is the fact that the Indiana statute does extend the veto power to many fathers who would not qualify under the constitutional standard of *Caban*. In such cases, the adoption could not proceed without the father's consent, unless the court could find one of the statutory grounds for dispensing with a parent's consent, such as abandonment, relinquishment or incompetence.[33]

The line drawn by the Indiana statute, based on the existence or nonexistence of a judicial finding of paternity, has no necessary relationship to the bona fides of the father's interest in his illegitimate child. Indeed, it is the father who comes forward voluntarily to assume responsibility for his child, financially and otherwise, whose paternity is least likely to be adjudicated in a court of law. Such a father must look to the Constitution for protection of his rights, because the Indiana statutes afford him none.[34]

3. Child Selling.—Two new crimes have been added to the Indiana Criminal Code, "child selling"[35] and "profiting from an adoption,"[36] both Class D felonies.

Child selling occurs when a person "transfers or receives any property in consideration for the termination of the care, custody, or control of a person's dependent child."[37] There are exceptions for transfers of property in connection with a dissolution of marriage or a juvenile court proceeding for termination of parental rights.[38] Additional exceptions for attorneys fees, medical expenses of pregnancy and childbirth, fees of child placing agencies and other court-approved fees apply to both crimes.[39]

"Profiting from an adoption" applies to "a person who, with respect to an adoption, transfers or receives any property in connec-

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protection clause of the fourteenth amendment, U.S. CONST. amend. XIV, § 1. 441 U.S. at 394.

[33]IND. CODE § 31-3-1-6(g)(1)-(5) (Supp. 1980). When a parent's consent is involved, the court has no power to dispense with consent on the ground that it is being "unreasonably withheld." *See id.* § 31-3-1-6(g)(6).

[34]If such a father dies intestate, there is no constitutional protection for the illegitimate child. The child can inherit from the father only if paternity has been adjudicated, or if the father has married the child's mother and acknowledged the child. *Id.* § 29-1-2-7(b) (1976). The Indiana Court of Appeals upheld this statute against an equal protection attack in Tekulve v. Turner, 391 N.E.2d 673 (Ind. Ct. App. 1979) (citing Lalli v. Lalli, 439 U.S. 259 (1978)).

[35]IND. CODE § 35-46-1-4(b) (Supp. 1980).

[36]*Id.* § 35-46-1-9.

[37]*Id.* § 35-46-1-4(b)(2).

[38]*Id.* § 35-46-1-4(b)(1).

[39]*Id.* §§ 35-46-1-4(b)(2), -9(b).

tion with the waiver of parental rights, the termination of parental rights, the consent to adoption, or the petition for adoption."[40]

B. Child Custody

1. Jurisdiction.—Section 14(a) of the Uniform Child Custody Jurisdiction Act (UCCJA) states that an Indiana court "shall not modify" a custody decree of another state unless it appears "that the court which rendered the decree does not now have jurisdiction . . . or has declined to assume jurisdiction to modify the decree."[41] During the survey period, the Indiana Supreme Court and the Indiana Court of Appeals each decided a case holding that an Indiana court had improperly assumed jurisdiction to modify an out-of-state decree.[42] Both cases contain discussions of various provisions of the UCCJA which should prove useful to trial courts and practitioners attempting to interpret and apply the new statute. A third case,[43] dealing with a trial court's duty to determine its own jurisdiction, also contains valuable discussion of the relevant UCCJA provisions.

In *State ex rel. Marcrum v. Marion County Superior Court*,[44] the mother brought an original proceeding in the Indiana Supreme Court, asking it to prohibit the trial court from exercising jurisdiction to modify a Texas custody order. A 1977 Texas divorce decree awarded custody of the parties' two children to the mother. Subsequently, the father moved to Indiana, and in 1978 he filed a motion for modification of custody in the Texas divorce proceeding. In 1979, he filed a custody modification proceeding in Indiana, while the children were in Indiana for a four-week visitation under the Texas decree. After obtaining an order of temporary custody from the Indiana court, the father withdrew his Texas motion and the Texas modification action was thereupon dismissed. The Indiana court then granted permanent custody to the father. The Indiana Supreme Court granted the mother's petition for alternative writs of mandate and prohibition, ordering the trial court to expunge the support orders and to refrain from exercising further jurisdiction in the case.[45] The court held that under UCCJA section 14 "Indiana must

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[40]*Id.* § 35-46-1-9(a).

[41]*Id.* § 31-1-11.6-14(a).

[42]State *ex rel.* Marcrum v. Marion County Superior Court, 403 N.E.2d 806 (Ind. 1980); *In re* Lemond, 395 N.E.2d 1287 (Ind. Ct. App. 1979).

[43]Clark v. Clark, 404 N.E.2d 23 (Ind. Ct. App. 1980).

[44]403 N.E.2d 806 (Ind. 1980).

[45]*Id.* at 811. Justice DeBruler dissented, arguing that the writ "should be denied because petitioner has failed to demonstrate in what manner her remedy by way of appeal from [the] final [custody] order is unavailable or inadequate." *Id.* (dissenting opinion).

refrain from modifying the custody decree of another state which had jurisdiction at the time of the decree and has continuing jurisdiction at the time the action to modify is filed in this state."[46]

Although it was ultimately decided under section 14, *Marcrum* contains much useful discussion of other provisions of the UCCJA. The court pointed out, for example, that there was some doubt whether Indiana met the jurisdictional requirements of section 3,[47] but declined to rule on this ground because the issue had not been argued on appeal.[48] The court refused to apply section 6, dealing with "[s]imultaneous proceedings in other states,"[49] because the Indiana proceeding sought modification of an existing custody order rather than an original determination of custody. The court noted that UCCJA section 8 requires an Indiana court to decline to exercise jurisdiction to modify an out-of-state custody order whenever a parent "has improperly removed the child from the physical custody of the person entitled to custody *or has improperly retained the child after a visit*," unless its assumption of jurisdiction is "required

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[46]*Id.* (citing Fry v. Ball, 190 Colo. 128, 544 P.2d 402 (1975)). The Indiana court quoted the following language from *Fry* in support of its interpretation of section 14:

> The underlying policy of the [UCCJA] is to prevent the desperate shifting from state to state of thousands of innocent children by interested parties seeking to gain custody rights in one state even though denied those rights by the decree of another state. The provisions of the Act seek "to eliminate jurisdictional fishing with children as bait." *Wheeler v. District Court*, 186 Colo. 218, 526 P.2d 658 (1974).

190 Colo. at 131, 544 P.2d at 405, *quoted in* 403 N.E.2d at 811.

[47]IND. CODE § 31-1-11.6-3 (Supp. 1980). The father claimed jurisdiction under subsections (a)(2) and (a)(3) of section 3. Under section 3(a)(2), jurisdiction is based on the fact that "the child and at least one (1) contestant, have a significant connection with this state," but the supreme court felt that the children's "significant connection" with Indiana was "suspect," because they were present in the state under the four-week visitation provision of the Texas decree. 403 N.E.2d at 807.

IND. CODE § 31-1-11.6-3(a)(3) (Supp. 1980) requires physical presence of the child plus *either* abandonment, *id.* § 31-1-11.6-3(a)(3)(A), or an "emergency" such as mistreatment, abuse or neglect, *id.* § 31-1-11.6-3(a)(3)(B), neither of which was present here. 403 N.E.2d at 808. Physical presence of the children alone is not a sufficient basis for jurisdiction under the UCCJA, IND. CODE § 31-1-11.6-3(b) (Supp. 1980), nor is physical presence a prerequisite to jurisdiction under the Act. *Id.* § 31-1-11.6-3(c). These provisions obviously are designed to discourage child snatching. *See id.* § 31-1-11.6-1(a)(5).

[48]403 N.E.2d at 808. The supreme court also felt the record on appeal was insufficient to permit it to determine whether jurisdiction existed in Indiana under section 3. *Id.*

[49]IND. CODE § 31-1-11.6-6 (Supp. 1980). Section 6 requires an Indiana court to decline jurisdiction if a prior custody proceeding is pending in another state, unless the other state's proceedings are stayed because Indiana is a more appropriate forum "or for other reasons." *Id.* § 31-1-11.6-6(a). The provision applies only if the other state is exercising jurisdiction "substantially in conformity with" the provisions of the UCCJA. *Id.*

in the interest of the child."[50] Because a determination of the child's interest is necessarily "largely discretionary,"[51] the court preferred to rely on the mandatory provisions of section 14.

The supreme court, noting that the UCCJA requires recognition of out-of-state decrees "made under factual circumstances meeting the jurisdictional standards" of the Act,[52] held that Texas had jurisdiction over the custody issue under UCCJA standards,[53] even though Texas had not adopted the Act. Strict reciprocity is not required.[54] The Indiana court held that the Texas court retained continuing jurisdiction over the custody issue and that its dismissal of the modification proceeding after the father withdrew his motion did not amount to a refusal by the Texas court to assume jurisdiction.[55] The Indiana court concluded that the father's attempt to terminate the Texas proceeding was the result of forum shopping and pointed out that "[d]iscouraging forum shopping is one of the primary purposes of the U.C.C.J.A."[56] Because the Texas court retained jurisdiction, section 14 required the Indiana courts to refrain from exercising jurisdiction to modify the Texas decree.

The Indiana Court of Appeals reached the same result under UCCJA section 14 in *In re Lemond*,[57] a case involving a custody order contained in a 1973 divorce decree issued in Hawaii. The decree awarded "the care, custody and control" of the daughter to both parents but specified that the father was to have physical custody so long as both parents resided in Hawaii; if either parent left Hawaii for a change of residence, physical custody was to be transferred to the mother, subject to reasonable visitation rights in

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[50]*Id.* § 31-1-11.6-8(b) (emphasis added). The propriety of the father's retention of the children beyond the four-week visitation period specified by the Texas decree would depend upon the validity of the trial court's temporary custody order, issued just before the end of the four-week period. The trial court's assumption of jurisdiction to modify would be valid only if there were evidence in the record to support the court's implicit determination that its exercise of jurisdiction was necessary to protect the "interest of the child." *Id.*

[51]403 N.E.2d at 810 (citing Nelson v. District Court, 186 Colo. 381, 527 P.2d 811 (1974)).

[52]IND. CODE § 31-1-11.6-13 (Supp. 1980), *quoted in* 403 N.E.2d at 809.

[53]403 N.E.2d at 809.

[54]Prefatory Note to Uniform Child Custody Jurisdiction Act (U.L.A.) at 114, *quoted in* 403 N.E.2d at 809 ("The Act is not a reciprocal law. It can be put into full operation by each individual state regardless of enactment of other states."). At least 45 states have adopted the UCCJA. *See* [1980] 6 FAM. L. REP. (BNA) 1130.

[55]403 N.E.2d at 811. Once the father withdrew his action, the Texas court simply "had no call to assume jurisdiction." *Id.*

[56]*Id.* at 810. The enumerated purposes of the statute support this conclusion. *See* IND. CODE § 31-1-11.6-1(a) (Supp. 1980), *quoted in* 403 N.E.2d at 809-10.

[57]395 N.E.2d 1287 (Ind. Ct. App. 1979).

the father.[58] In June 1977, the father remarried and moved to Indiana. That fall, he attempted unsuccessfully to prevent the daughter's return to Hawaii after summer visitation in Indiana with her grandparents. The following May, the father went to Hawaii and brought the child back to Indiana while the mother was away. The mother then came to Indiana and filed a petition for enforcement of the Hawaiian decree; the petition was denied by the trial court.[59] The Indiana Court of Appeals reversed, holding that, under section 14, the Indiana court was obligated to defer to the prior jurisdiction of the Hawaiian court, even though the Indiana court could meet the jurisdictional requirements of the UCCJA.[60]

The court of appeals ruled that Hawaii, as the child's "home state,"[61] retained continuing jurisdiction over custody; the Indiana court therefore could not modify the decree by awarding the father physical custody. The court of appeals rejected the father's argument that the trial court did not "modify" the Hawaiian decree but merely enforced its "non-punitive" provisions.[62] Conceding that a custody decree which was truly punitive might not be entitled to "total deference" in Indiana,[63] the court was not convinced that the decree in question had been fashioned "to punish the Father rather than benefit the child."[64]

In *Clark v. Clark*,[65] a 1976 Indiana dissolution decree awarded custody of the parties' daughter to the mother. In the fall of 1978, the mother left the child with the father in Indiana when she went to live in Kentucky, but she returned in October and took the child back to Kentucky with her. Two months later, the father filed a

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[58]*Id.* at 1289.

[59]*Id.* at 1290. The trial court also "denied" a petition for modification filed by the father, although its decision, in effect, did modify the Hawaiian decree. *Id.*

[60]*Id.* at 1290-91 (citing Woodhouse v. District Court, 196 Colo. 558, 587 P.2d 1199 (1978) and Green v. Green, 87 Mich. App. 706, 276 N.W.2d 472 (1979)).

[61]IND. CODE § 31-1-11.6-2(5) (Supp. 1980). "Home state" is defined as "the state in which the child, immediately preceding the time involved, lived with . . . a parent . . . for at least six (6) consecutive months . . . ." Section three of the UCCJA grants jurisdiction to a state which "had been the child's home state within six (6) months before commencement of the proceedings [if] the child is absent from [the] state because of his removal or retention by a person claiming his custody . . . and a parent . . . continues to live in [the] state." *Id.* § 31-1-11.6-3(a)(1)(B).

[62]395 N.E.2d at 1291.

[63]*Id.* (citing Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978 (1977)).

[64]395 N.E.2d at 1291. With no evidence to support the father's argument, the court of appeals presumed the Hawaiian court was motivated by "a desire to further the best interests of the child." *Id.* at 1292. The court also rejected the father's argument that the Hawaiian decree infringed upon his constitutional right to travel. *Id.*

[65]404 N.E.2d 23 (Ind. Ct. App. 1980).

petition for change of custody.[66] After the first day of the hearing, in January 1979, the mother failed to bring the child for a weekend visit, as ordered by the court, and did not appear herself for the conclusion of the hearing. The court then awarded custody of the child to the father and issued a body attachment for the mother's arrest. After the mother filed a motion to correct errors, attacking the court's jurisdiction under the UCCJA, a further hearing was held in April 1979, but the trial court's final order left custody of the child with the father. The court of appeals affirmed, upholding the trial court's jurisdiction. Even though the trial court had erred in failing to make a finding of its own jurisdiction under the UCCJA, the error was harmless because the court clearly did have jurisdiction in this case.[67] The court of appeals also upheld the trial court's decision on the merits, affirming the order transferring custody to the husband.[68]

The court of appeals agreed with the mother that under the UCCJA the trial court had an affirmative duty to determine its own jurisdiction over the subject matter even though neither party raised the issue during the initial hearings.[69] The duty arose as soon as the court became aware that the custody dispute had "an interstate dimension."[70] Determination of subject matter jurisdiction under the UCCJA is a two-step process. First, the court must determine whether it has jurisdiction; then it must decide whether it should

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[66]The father first filed an emergency petition asking for temporary custody, while the child was visiting with him, when he learned the mother had been hospitalized for taking too many aspirins, but when the trial court determined that no emergency existed, he returned the child to her mother and requested a hearing for a permanent modification of custody. *Id.* at 26.

[67]*Id.* at 34. Several other allegations of error were raised by the mother on appeal, including the court's denial of her motion for change of venue and her motion for rule to show cause, which sought to punish the husband for failing to return the child to her before the emergency hearing of December, 1978.

[68]*Id.* at 35.

[69]*Id.* at 28. The duty was enunciated in Campbell v. Campbell, 388 N.E.2d 607 (Ind. Ct. App. 1979). The jurisdiction issue was raised for the first time in the wife's initial motion to correct errors filed March 16, 1979. Even though a further hearing was held thereafter, on April 9, 1979, the trial court never made a formal ruling on jurisdiction, although it "noted its subject matter jurisdiction under the theory of continuing jurisdiction at the outset of each proceeding." 404 N.E.2d at 30 n.2. Continuing jurisdiction would not of itself satisfy the requirements of the UCCJA, although the court of appeals noted that courts operating under the UCCJA "have exercised a preference in favor of continuing jurisdiction where there is a significant connection remaining with the home state at the time a modification is sought." *Id.* at 28 n.1.

[70]*Id.* at 29. In *Clark*, the interstate nature of the dispute was clear from the outset, because the father alleged in his initial petition that the mother had moved to Kentucky. *Id.* at 30.

exercise that jurisdiction.[71] The court of appeals was convinced that, had the trial court made the proper determination of jurisdiction at the outset of the *Clark* proceedings, it would have found that it did have jurisdiction and "that there was no other court which . . . could have exercised jurisdiction" at that time under the UCCJA.[72] Indiana was the "home state" of the child, as defined in the statute.[73] No proceedings were pending in other states, and there was no other more appropriate forum.[74] In view of this, the court of appeals held that the trial court's failure to determine its own jurisdiction was harmless error and refused to remand on the issue of jurisdiction. The court felt that the child's best interests "require[d] a prompt and lasting decision with regard to her custody."[75]

In *McCarthy v. McCarthy*,[76] the custody issue arose in a juvenile court proceeding. The parents were divorced in Maine in June 1978, and custody of the son was awarded to the mother. The following October, the Indiana juvenile court held that the child was a "neglected child" as defined in the former juvenile statutes[77] and

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[71]*Id.* at 29. The court of appeals quoted the following from an Oregon case, inserting the appropriate Indiana citations:

> Under the Act the court must go through a multistep process in determining whether to exercise jurisdiction . . . under [IND. CODE § 31-1-11.6-3]. If it finds that there is jurisdiction, then the court must determine whether there is a custody proceeding pending or a decree in another state which presently has jurisdiction. If so, the [Indiana] court must decline to exercise its jurisdiction. [IND. CODE § 31-1-11.6-6] Finally, assuming the court has jurisdiction and there is not a proceeding pending or a decree, the court then must determine under [IND. CODE § 31-1-11.6-7] whether to exercise its jurisdiction because of convenient forum.

404 N.E.2d at 30 (quoting Carson v. Carson, 29 Or. App. 861, 865, 565 P.2d 763, 764-65 (1977)).

[72]404 N.E.2d at 30.

[73]IND. CODE §§ 31-1-11.6-2(5), -3(a)(1) (Supp. 1980). The child had lived all of her seven years in Indiana until her mother removed her to Kentucky in October, 1978. 404 N.E.2d at 31. Even if Indiana lost its status as "home state" it could retain jurisdiction as long as the child and one parent maintained a "significant connection" with Indiana, and there was in the state "substantial evidence concerning the child's present or future care, protection, training, and personal relationships." IND. CODE § 31-1-11.6-3(a)(2) (Supp. 1980).

[74]The court of appeals believed that the trial court could have determined on the facts of *Clark* that "a Kentucky court would not have had subject matter jurisdiction under section 3 of the Uniform Act." 404 N.E.2d at 32. In any case, a Kentucky court might have refused to take jurisdiction under the "clean hands" provision of the UCCJA, IND. CODE § 31-1-11.6-8 (Supp. 1980). 404 N.E.2d at 32.

[75]404 N.E.2d at 33. The court also affirmed the trial court's decision on the merits, rejecting the wife's argument that the court had "improperly based its modification on punitive motives rather than on the best interests of the child." *Id.* at 34.

[76]401 N.E.2d 759 (Ind. Ct. App. 1980).

[77]*Id.* at 761. IND. CODE § 31-5-7-6 (1976) (repealed effective October 1, 1979) defined a neglected child as one who "(1) Has not proper parental care or guardianship [or] . . .

transferred custody to the father, with limited visitation rights to the mother.[78] The Indiana Court of Appeals affirmed without discussing the custody jurisdiction issue implicit in the facts. The court simply relied upon the juvenile statutes which authorized the trial court to "place" a child found to be neglected "in the custody of a relative or other fit person."[79]

The mother argued that the juvenile court had "improperly redetermined the issue of custody"[80] but apparently did not specifically attack the court's jurisdiction to modify an out-of-state custody decree under the UCCJA.[81] As *Lemond* indicates, the Indiana courts may well have lacked the power to modify the Maine custody order had the issue been raised in a custody modification proceeding.[82] The UCCJA, however, provides for emergency jurisdiction when a child present in the state is "subjected to or threatened with mistreatment or abuse or is *otherwise neglected or dependent*."[83] This provision should support the Indiana trial court's jurisdiction to make its finding of neglect and its order transferring custody to the father. It is not clear, however, that such emergency jurisdiction in Indiana would oust the original custody court, Maine, from its continuing jurisdiction over the controversy. If custody modification proceedings were instituted in Maine in these circumstances, this would seem to be an appropriate occasion for utilizing the UCCJA provi-

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(5) Is in an environment dangerous to life, limb, or injurious to the health or morals of himself or others." Under the present juvenile code, such a child would be characterized as a "child in need of services." *See id.* § 31-6-4-3 (Supp. 1980).

[78]Visitation was limited to two weeks in the summers of 1979 and 1980, at the father's place of residence, but would increase to one month in the summer of 1982. The order made no reference to any visitation in the summer of 1981. 401 N.E.2d at 761.

[79]*Id.* at 763 (relying on IND. CODE 31-5-7-15 (1976) (repealed effective October 1, 1979)). The court of appeals also upheld the trial court's restrictive visitation order as within the court's "broad discretion" in custody matters. 401 N.E.2d at 763.

[80]401 N.E.2d at 762.

[81]The Uniform Child Custody Jurisdiction Act applies to child neglect and dependency proceedings in which custody is an issue, as well as to custody proceedings in connection with divorce actions. *See* IND. CODE § 31-1-11.6-2(3) (Supp. 1980).

[82]It is not clear from the *McCarthy* opinion when the mother and son came to Indiana, but there is some indication they were here in December 1977, seven months before the juvenile court proceedings were commenced. 401 N.E.2d at 762. Indiana thus may have qualified as the child's "home state" under IND. CODE § 31-1-11.6-3(a)(1) (Supp. 1980). The Maine court's jurisdiction may nevertheless have continued if the child and at least one contestant had a "significant connection" with the state, and substantial evidence concerning the child was available in the state. ME. REV. STAT. ANN. tit. 19 § 804(1)(B) (Supp. 1980-81). *See* Fry v. Ball, 190 Colo. 128, 544 P.2d 402 (1975).

[83]IND. CODE § 31-1-11.6-3(a)(3)(B) (Supp. 1980) (emphasis added).

sions calling for communication between courts in different states to determine which court is the "more appropriate forum."[84]

2. Visitation.—Section 24(b) of the Indiana Dissolution of Marriage Act[85] forbids a court to "restrict" a parent's visitation rights "unless it finds that the visitation might endanger the child's physical health or significantly impair his emotional development."[86] Modification of a visitation order, however, requires only a finding that "modification would serve the best interests of the child."[87] In *Chance v. Chance*,[88] the trial court, on petition of the father, amended a dissolution of marriage decree to provide more specific visitation periods.[89] The court of appeals affirmed, declining to treat the trial court's order as a "restriction" on visitation requiring a finding of danger to the children's physical or mental health.[90] "The visitation as now specified is neither a restriction nor an expansion of the visitation as specified in the original dissolution agreement. Rather, it is a determination of what is reasonable visitation."[91]

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[84]*Id.* § 31-1-11.6-6(c). The UCCJA also calls for exchange of information and other forms of cooperation between courts in different states. *See id.* §§ 31-1-11.6-19 to -22.

In two other custody cases decided during the survey period, the court of appeals reaffirmed that the standard of review in custody cases is abuse of discretion. *In re* Marriage of Julien, 397 N.E.2d 651 (Ind. Ct. App. 1979), involved a custody award in a dissolution of marriage decree. Based on conflicting evidence, the trial court awarded custody of two of the couple's three children to the father. The court of appeals affirmed, holding that the mother had not established a "manifest abuse of discretion" by the trial court. *Id.* at 653. In Campbell v. Campbell, 396 N.E.2d 142 (Ind. Ct. App. 1979), the trial court also awarded the father custody of the younger two of the parties' three children, this time in a custody modification proceeding. Again the court of appeals affirmed, finding no abuse of discretion by the trial court. *Id.* at 143.

[85]IND. CODE § 31-1-11.5-24(b) (1976).

[86]*Id.*

[87]*Id.*

[88]400 N.E.2d 1207 (Ind. Ct. App. 1980).

[89]The decree incorporated an agreement of the parties providing "reasonable visitation" to the father on two days' notice to the mother, and "split time" on specified holidays. *Id.* at 1209 n.1. The revised order granted the father visitation on alternate weekends, from 6 p.m. Friday to 6 p.m. Sunday, for four weeks in the summer, and on alternate holidays. *Id.* at 1211.

[90]*Id.* The court of appeals also refused to treat the father's "Petition for Instructions" as a petition for modification of custody, requiring a showing of changed circumstances and a verified petition under Marion County Rules of Practice & Procedure, Circuit & Superior Cts., Rule 20. *Id.* at 1209-11. Local Rule 20 requires a verified petition showing "an extreme emergency" before a petition for modification of custody will be entertained within less than a full year from the date of the latest custody decision.

IND. CODE § 31-1-11.5-22(d) (1976) requires "a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable" before modification of a custody order; a modification of visitation rights, however, requires only a showing that "modification would serve the best interests of the child." *Id.* § 31-1-11.5-24(b).

[91]400 N.E.2d at 1211.

An order calling for visitation with the children's stepfather was affirmed by the court of appeals in *Collins v. Gilbreath*.[92] The three children had lived with their mother and stepfather for more than two years when the mother committed suicide. Ten days later, the father brought a habeas corpus action to regain custody of the children from their stepfather. The trial court awarded custody to the father but ordered him to permit the stepfather to visit the children. In affirming, the court of appeals conceded that the Indiana Dissolution of Marriage Act grants no visitation rights to nonparents,[93] but the court properly considered the well-being of the children to be paramount. The stepfather had cared for the children as a father, and to end this close relationship abruptly might well prove traumatic. "The children would in essence lose their second parent in ten days—one by suicide and one by court decree."[94] The court of appeals concluded that the order was not an abuse of discretion but was rather "a wise decision by a thoughtful and insightful judge."[95]

The dissenting opinion argued that the stepfather, as an "unrelated third party," had no standing to ask for visitation unless the natural father were found to be unfit for custody.[96] The majority, however, viewed the father's right to custody as less than absolute. It "is not akin to a property right, but is more in the nature of a trust which may be subject to the well-being of the child."[97] In essence, it was not the stepfather's right to visitation which was upheld in *Collins* but the children's right to continue their association with him.

C. Child Support

1. Cost of Living Adjustments.—Orders for child support are subject to modification when a substantial and continuing change of circumstances occurs.[98] Some changes are so predictable that the

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[92]403 N.E.2d 921 (Ind. Ct. App. 1980). The court of appeals reversed the trial court's order directing the father to pay $750 in support arrearages to the stepfather, holding that any arrearages should be paid to the deceased mother's estate. *Id.* at 924. Judge Young dissented on the visitation issue. *Id.* (dissenting opinion).

[93]*See* IND. CODE § 31-1-11.5-24 (1976).

[94]403 N.E.2d at 923.

[95]*Id.*

[96]*Id.* at 924 (Young, J., dissenting). It should be noted that the stepfather in *Collins* did not request visitation rights, but the visitation order was made by the trial court *sua sponte*. *Id.*

[97]*Id.* at 923 (citing Looper v. McManus, 581 P.2d 487 (Okla. Ct. App. 1978)).

[98]IND. CODE § 31-1-11.5-17(a) (Supp. 1980). "Such modification shall be made only upon a showing of changed circumstances so substantial and continuing as to make the terms [of the original decree] unreasonable." *Id.*

parties sometimes provide for them in advance by agreement. Especially predictable in recent years is the inexorable rise in the cost of living, and parties may provide for automatic cost of living adjustments in various kinds of contracts, including divorce settlements. In *Branstad v. Branstad*,[99] however, the parties were unable to agree on the issues of custody and child support;[100] it was the trial court which ordered annual adjustments in the child support order, based on the percentage change in the Consumer Price Index published by the United States Department of Labor. The court of appeals affirmed, holding that the cost of living adjustments did not violate the modification provisions of the Indiana Dissolution of Marriage Act.[101]

In affirming the trial court's order, the court of appeals distinguished cases invalidating automatic adjustments based upon factors not related to actual needs of the children.[102] In *Branstad*, the trial court had first ascertained that the amount of $1,200 per month was needed to meet the children's actual needs. The cost of living adjustment "simply assure[d] that the buying-power equivalent of $1,200 as of January 1, 1979, [would] be available each month during succeeding years."[103] The support order would still be subject to modification in the event of changed circumstances. In sum, the court of appeals approved the order because the adjustment provision

> (1) gives due regard to the actual needs of the child[ren], (2) uses readily obtainable objective information, (3) requires only a simple calculation, (4) results in judicial economy, (5) reduces expenses for attorney fees, and (6) in no way infringes upon the rights of either . . . parent to petition the court for modification of the decree due to a substantial and continuing change of circumstances.[104]

2. Modification and Termination.—In the absence of special circumstances, the duty of a parent to support his (or her) child terminates upon emancipation of the child.[105] For child support pur-

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[99]400 N.E.2d 167 (Ind. Ct. App. 1980).

[100]The parties did settle the division of property by agreement. *Id.* at 168.

[101]IND. CODE § 31-1-11.5-17(a) (Supp. 1980).

[102]400 N.E.2d at 170 (discussing *In re* J.M. & G.M., 585 S.W.2d 854 (Tex. Civ. App. 1979) (arbitrary formula) and *In re* Marriage of Mahalingam, 21 Wash. App. 228, 584 P.2d 971 (1978) (percentages of father's salary increases and outside income)).

[103]400 N.E.2d at 170.

[104]*Id.* at 171.

[105]IND. CODE §§ 31-1-11.5-12(d), -17(b) (Supp. 1980). The special circumstances justifying continuation of the support duty beyond emancipation include educational needs, *id.* § 31-1-11.5-12(d)(1), and incapacity of the child, *id.* § 31-1-11.5-12(d)(2).

poses, emancipation occurs at the age of twenty-one, but it may occur earlier, for all purposes except the child's educational needs.[106] Whenever the child is emancipated, any outstanding decree ordering the parent to support the child terminates automatically; support payments cease to accrue, and arrearages accrued in the period prior to emancipation are no longer enforceable by contempt.[107] Problems can arise, however, when there is a factual dispute as to whether early emancipation has occurred[108] or when an undivided support order covers more than one child. Both of these problems were present in *Ross v. Ross*.[109]

The 1967 decree in *Ross* ordered the father to pay $42.50 per week for the support of four minor children in the custody of the mother. By 1977, when the father was cited for contempt for nonpayment of support, three of the four children had been emancipated. The date of emancipation of one of the children was in dispute. Without resolving this factual dispute, the trial court found the father in contempt, ordered him to pay arrears computed at the full $42.50 per week but reduced his obligation for future support to $25.00 per week for the one remaining minor child.[110] The court of appeals affirmed, holding that the husband remained obligated to pay the full amount ordered as long as any of the children remained unemancipated; the original order remained in effect until modified by the trial court.[111] Without a court-ordered modification, the father was not entitled to a proportionate reduction of his support obligation each time one of the children was emancipated.[112]

The court of appeals reasoned that, in making a support order, a trial court considers other factors in addition to the children's needs.[113] The court must consider the financial resources and needs of the noncustodial parent and may order the parent to pay less sup-

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[106]*Id.* § 31-1-11.5-12(d).

[107]Corbridge v. Corbridge, 230 Ind. 201, 102 N.E.2d 764 (1952); Kuhn v. Kuhn, 389 N.E.2d 319 (Ind. Ct. App. 1979).

[108]"What constitutes emancipation of a minor child is a question of law, but whether there has been an emancipation is a question of fact." Brokaw v. Brokaw, 398 N.E.2d 1385, 1388 (Ind. Ct. App. 1980) (citing Stitle v. Stitle, 245 Ind. 168, 197 N.E.2d 174 (1964)).

[109]397 N.E.2d 1066 (Ind. Ct. App. 1979).

[110]The arrears were ordered paid at the rate of $25.00 per week. *Id.* at 1068.

[111]*Id.* at 1069.

[112]*Id.* at 1070. Under the court of appeals' analysis of the case, it was unnecessary for the trial court to determine the exact date of emancipation of each child. *Id.*

[113]IND. CODE § 31-1-11.5-12(a) (1976) requires the court to consider "all relevant factors including: (1) the financial resources of the custodial parent; (2) standard of living the child would have enjoyed had the marriage not been dissolved; (3) physical or mental condition of the child and his educational needs; and (4) financial resources and needs of the noncustodial parent."

port than the children actually need in cases where the parent's resources are limited. In such cases it would be unfair to the remaining minor children to allow an automatic reduction of support each time a child becomes emancipated. The court of appeals chose instead to place the burden upon the noncustodial parent to petition for modification if he wishes to reduce the support payments.[114] The emancipation of a child would usually constitute a change of circumstances sufficient to justify modification if the needs of the remaining children could be met by a reduced support order.[115] That such modification would not automatically result in a proportionate reduction of support is well illustrated by the *Ross* order: The original order of $42.50 per week for four children was reduced to $25.00 per week for the one remaining child. Taking into account the inflation that had occurred since the original order was entered in 1967, this was nevertheless a substantial reduction.

In *Brokaw v. Brokaw*,[116] the original 1975 support order, based upon an agreement of the parties, provided for payments of $500 per month until the child reached the age of eighteen. The agreement was made "subject, however, to any limitations or modifications hereinafter imposed by any court having jurisdiction over such matters."[117] In 1977, the father obtained a modification of the custody provisions of the order, and retained custody of the son for approximately a year. When custody was returned to the mother in 1978, the court modified the support provisions of the original decree, ordering the father to pay $140 per week as support, and to pay the son's expenses for tuition, books, lab fees and similar fees "while [the son attended] the Fort Wayne Indiana-Purdue campus."[118] The father ceased making the weekly payments one month before the son's eighteenth birthday. In a contempt proceeding brought by the mother, the trial court again ordered the father to pay $140 per week "until [the son] completes his undergraduate college education provided he continues in a diligent fashion towards obtaining a

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[114]397 N.E.2d at 1070.

[115]IND. CODE § 31-1-11.5-17 (Supp. 1980) requires a "showing of changed circumstances so substantial and continuing as to make the terms [of the support order] unreasonable" to justify a modification.

[116]398 N.E.2d 1385 (Ind. Ct. App. 1980).

[117]*Id.* at 1387. Indeed, the support order would have been subject to modification even without this express provision. IND. CODE § 31-1-11.5-17(a) (Supp. 1980) provides for modification of any child support order, upon a showing of changed circumstances. When an agreement is approved by the court, as was the *Brokaw* agreement, it is "incorporated and merged" into the court's decree, becoming in effect an order of the court. *Id.* § 31-1-11.5-10(b). *See generally* Carson v. Carson, 120 Ind. App. 1, 9, 89 N.E.2d 555, 559 (1950) (decided under prior law).

[118]398 N.E.2d at 1387.

degree in the normal time period, or until he reaches 21 years of age, *whichever occurs later*."[119] The court of appeals affirmed, rejecting the father's contention that a modification of the prior support order could not properly be effected in a contempt proceeding.[120]

The father argued on appeal that the trial court's 1978 order, which simply directed him to pay $140 per week plus his son's college expenses, did not modify the original order terminating support when the son reached eighteen. He contended that the 1979 order, specifically extending support until the son finished college, was ineffective to revive the father's duty to pay support, because it arose in a contempt proceeding in which extension of support was not at issue. The court of appeals rejected this analysis, emphasizing the fact that the son did not in fact become emancipated on his eighteenth birthday.[121] The father's statutory duty of support therefore continued, at least until the son reached the age of twenty-one. Whether it would continue thereafter is somewhat uncertain under the present statute, and the *Brokaw* opinion did not directly address this question.

The ambiguity lies in section 12(d)(1) of the Indiana Dissolution of Marriage Act, which provides:

> The duty to support a child under this chapter ceases when the child reaches his twenty-first (21st) birthday unless:
>
> (1) The child is emancipated prior to his twenty-first (21st) birthday in which case the child support, except for educational needs, terminates at the time of emancipation; however, an order for educational needs may continue in effect until further order of the court.[122]

A careful reading of this statute indicates that an existing order for educational needs may continue in effect even though a child is emancipated prior to his twenty-first birthday. The more difficult question, not addressed in *Brokaw*, is whether an order for educational needs can properly extend *beyond* the child's twenty-first birthday, as the trial court's 1979 order purported to do.[123] Section

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[119] *Id.* (emphasis added). The court "admonished [the father] to petition this Court for modification of decree before taking any unilateral action regarding termination of support under claim of emancipation or change of circumstances, etc." *Id.*

[120] *Id.* at 1388-89.

[121] *Id.*

[122] IND. CODE § 31-1-11.5-12(d)(1) (Supp. 1980).

[123] The order terminated the father's duty of support when the son completed his undergraduate education or reached the age of twenty-one "whichever occurs later." 398 N.E.2d at 1387. *See* text accompanying note 117 *supra*. The son in *Brokaw* had

12(d)(1) provides that the duty of support terminates at twenty-one, unless the child is emancipated prior to twenty-one, in which case only the duty to pay for educational needs survives. The final clause of the section provides that, "however, an order for educational needs may continue in effect until further order of the court."[124] This proviso arguably might refer back only to the immediately preceding provision dealing with emancipation prior to twenty-one, in which case it would mean that an order for educational needs could extend beyond emancipation but would terminate at twenty-one under the opening clause of section 12(d). The alternative interpretation is that the proviso refers all the way back to the beginning of section 12(d) and modifies the provision terminating the duty of support at twenty-one. This would mean that any order for educational needs could extend beyond the child's twenty-first birthday. This is the interpretation adopted by the trial court in *Brokaw*, and it seems to be consistent with the overall intent of section 12(d). It would make little sense to say that a parent's duty to pay educational expenses could survive the actual emancipation of the child before age twenty-one, but that the duty would terminate automatically upon the child's emancipation by operation of law on his twenty-first birthday. It should be noted that section 12(d)(2), in language that is very similar to the language of the proviso in section 12(d)(1),[125] extends the duty of support beyond the age of twenty-one when the child is "incapacitated."[126] The better interpretation of section 12(d) is that the duty to pay child support terminates when the child is emancipated, at or before age twenty-one, except for educational needs and except when the child is incapacitated. At least by implication, this is the interpretation adopted by the court of appeals in affirming the *Brokaw* order.[127]

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just turned eighteen, so the potential duration of the order beyond his twenty-first birthday was not yet at issue.

[124]IND. CODE § 31-1-11.5-12(d)(1) (Supp. 1980).

[125]The duty to support an incapacitated child "continues during the incapacity or until further order of the court." *Id.* § 31-1-11.5-12(d)(2). *Compare id. with id.* § 31-1-11.5-9(c), for similar language dealing with the duty to support an incapacitated spouse.

[126]*Id.* § 31-1-11.5-12(d)(2).

[127]Estate of Hinds v. State, 390 N.E.2d 172 (Ind. Ct. App. 1979) dealt with the duty to support an adult child, which existed under prior law. Before 1969, the parent of an adult child was responsible for the cost of his care and treatment in a state psychiatric hospital; an amendment effective August 18, 1969 redefined "responsible relative" to exclude "parents of patients over the age of eighteen (18) years of age who have been in a psychiatric hospital for a continuous period of twelve (12) months or longer." IND. CODE § 16-14-18-1(5) (1976). In *Hinds*, the court of appeals held that the 1969 amendment did not extinguish liability for care of an adult child accrued prior to the effective date of the statute. 390 N.E.2d at 173-74 (citing State *ex rel.* Mental Health Comm'r v.

3. Statute of Limitations.—Considerable confusion has been generated in recent years concerning the statute of limitations applicable to actions to enforce child support orders. The issue turns on whether a support order is a final judgment; if it is, then the statute of limitations for judgments obviously applies. The court of appeals first decided that a support order was not a final judgment, holding that a second judgment for arrears was necessary before such an order could be enforced.[128] The court also held that the two-year statute of limitations for injuries to personal property applied to an action for reimbursement of support not involving a court order.[129] In the second appeal of *Kuhn v. Kuhn*,[130] the court of appeals reconsidered its earlier reasoning and held that court-ordered installments of support become final judgments as they accrue; a second judgment for arrears is therefore unnecessary, and the ten-year statute of limitations for judgments applies.[131] This holding recognized and eliminated the conflict between the court's prior rulings and the Indiana rule that support orders are not retroactively modifiable.[132]

The Indiana Supreme Court revived the old anomalies in Indiana law by its reversal of the court of appeals in *Kuhn v. Kuhn*.[133] The most recent *Kuhn* decision held that a support order was not a final judgment, nor was it a debt or a contract; therefore, an action to enforce such an order was covered by the catch-all fifteen-year statute of limitations.[134] The court then underscored the anomaly by holding

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Estate of Lotts, 332 N.E.2d 234 (Ind. Ct. App. 1975)). The court went on to hold, however, that the state had failed to prove that the patient's father had been notified of the state's claim prior to October 21, 1966; the father's estate was therefore liable for the son's care only from that date until the effective date of the amendment. *Id.* at 178-79. Notice was necessary in order to give the parent the opportunity to contest liability, and to attempt to show his inability to pay the cost of his son's maintenance. *Id.* at 177.

[128]Kuhn v. Kuhn, 361 N.E.2d 919 (Ind. Ct. App. 1977) (dictum) (enforcement by contempt); Owens v. Owens, 354 N.E.2d 350 (Ind. Ct. App. 1976) (enforcement by execution).

[129]Strawser v. Strawser, 364 N.E.2d 791 (Ind. Ct. App. 1977).

[130]389 N.E.2d 319 (Ind. Ct. App. 1979). The trial court had applied the two-year statute of limitations in *Kuhn*. *See* discussion in Garfield, *supra* note 22, at 234-35.

[131]389 N.E.2d at 322. The statute of limitations began to run on each installment as it became due. *Id.*

[132]Zirkle v. Zirkle, 202 Ind. 129, 172 N.E. 192 (1930); Jahn v. Jahn, 385 N.E.2d 488 (Ind. Ct. App. 1979); *In re* Marriage of Honkomp, 381 N.E.2d 881 (Ind. Ct. App. 1978); Haycraft v. Haycraft, 375 N.E.2d 252 (Ind. Ct. App. 1978). Nonmodifiable support orders generally are treated as final judgments for enforcement purposes. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 15.3 at 509 (1968).

[133]402 N.E.2d 989 (Ind. 1980).

[134]*Id.* at 991 (applying IND. CODE § 34-1-2-3 (1976), which provides: "All actions not limited by other statute shall be brought within fifteen (15) years.").

that the statute of limitations began to run on each installment as it became due, citing four cases from other jurisdictions, all of which applied the statute of limitations for *judgments* to past due child support payments.[135] Indeed, it is because an accrued installment of child support is treated as a judgment that the statute of limitations is held to run on each installment as it becomes due.[136] "Where a motion to enter a judgment for arrears is required, the statute should only begin to run from the time such a judgment is entered."[137] The Indiana Supreme Court, however, did not decide what would happen after the judgment for arrears was entered. Presumably, the ten-year statute of limitations for judgments would then become applicable and would begin to run from the date of entry of the judgment,[138] resulting in a potential combined total limitation period of twenty-five years for each support installment.

The *Kuhn* opinion contains little discussion either of policy or of precedent. It merely cites *Owens v. Owens*[139] and the first *Kuhn* decision,[140] without addressing the court of appeals' second *Kuhn* opinion[141] which effectively demonstrated that the earlier opinons had misconstrued and misapplied existing precedents.[142] The supreme court also relied upon a permissive statute which provides that, in an action to enforce a support order, "the court *may*: (1) enter a judgment against the person obligated to pay support,"[143] which hardly supports the court's holding that such a judgment is required in every case.

The argument that the supreme court seems to have considered most persuasive was a highly speculative one: If delinquent support

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[135]Miller v. Miller, 122 F.2d 209 (D.C. Cir. 1941); Mark v. Safren, 227 Cal. App. 2d 151, 38 Cal. Rptr. 500 (1964); Dent v. Casaga, 296 Minn. 292, 208 N.W.2d 734 (1973); Roberts v. Roberts, 69 Wash. 2d 863, 420 P.2d 864, 866 (1966) ("[E]ach installment of alimony or child support, when unpaid, becomes a separate judgment. . . .").

[136]"Where the local law decrees that the installments [of child support] constitute judgments when they fall due, it follows that the statute of limitations then begins to run as it would in the case of any other judgment." CLARK, *supra* note 132, § 15.3 at 511.

[137]*Id.*

[138]This is at least implied in the court's statement that "[w]e believe the analogy between a final judgment and accrued court-ordered support is too tenuous to justify the application of the statute of limitations for judgments to child support arrearages *which have not been reduced to a lump-sum judgment*." 402 N.E.2d at 991 (emphasis added).

[139]354 N.E.2d 350 (Ind. Ct. App. 1976).

[140]361 N.E.2d 919 (Ind. Ct. App. 1977).

[141]389 N.E.2d 319, 321-22 (Ind. Ct. App. 1979).

[142]*E.g.*, Corbridge v. Corbridge, 230 Ind. 201, 102 N.E.2d 764 (1952); Grace v. Quigg, 150 Ind. App. 371, 276 N.E.2d 594 (1971).

[143]IND. CODE § 31-1-11.5-13(e) (Supp. 1980) (emphasis added).

installments were treated as final judgments, "a question would arise as to whether such a judgment would constitute a lien upon the real estate of the parent who becomes delinquent," which "could have a devastating effect upon the alienability of real estate."[144] No liens on real estate were involved in *Kuhn*, but if the court believed it would be "devastating" for a support judgment to constitute a lien on the delinquent parent's real estate, then all that was needed was an unequivocal statement that a judgment for child support would not constitute such a lien. Two Indiana cases cited in *Kuhn* support such a statement.[145] Apparently, however, the court cited these cases to show that delinquent support payments are not treated as final judgments for lien purposes; therefore, the court reasoned they should not be treated as final judgments for statute of limitations purposes either. This reasoning simply ignores the very different policy considerations involved. As the court itself recognized,[146] there is a strong public policy favoring free alienability of land which influences the outcome of the lien issue but is not at all involved in the statute of limitations question. Here, the relevant policy is that which strongly favors the effective enforcement of child support obligations, as evidenced by the special remedies provided for their enforcement.[147] That policy is frustrated by requiring a judgment for arrears in every case before action can be taken to enforce a support order.[148]

In seeking to avoid the anomaly of treating support orders differently for statute of limitations purposes than for lien purposes, the court created an even greater anomaly in the area of interstate enforcement of Indiana support orders. Interstate recognition under the full faith and credit clause[149] is accorded only to final judgments;

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[144]402 N.E.2d at 990.

[145]Myler v. Myler, 137 Ind. App. 605, 210 N.E.2d 446 (1965); Rosenberg v. American Trust & Sav. Bank, 86 Ind. App. 552, 156 N.E. 411 (1927). The court of appeals recently held that an alimony judgment does not constitute a lien upon the obligor's real estate insofar as future payments are concerned. Uhrich v. Uhrich, 362 N.E.2d 1163 (Ind. Ct. App. 1977).

[146]402 N.E.2d at 990.

[147]*E.g.*, IND. CODE §§ 31-1-11.5-13(e), -17(a) (1976); *id.* §§ 31-2-1-1 to -39 (Uniform Reciprocal Enforcement of Support Act). The Indiana statutes seem to contemplate that support orders will be enforced *as judgments. Id.* § 31-1-11.5-17(a) provides in part: "Terms of the [dissolution] decree may be *enforced by all remedies available for enforcement of a judgment* including but not limited to contempt or an assignment of wages . . . ." (Emphasis added).

[148]Little compensating advantage results from the longer statute of limitations, which often will merely extend the delinquent parent's support obligation beyond the time of the children's greatest need, to the benefit of the custodial parent rather than the children.

[149]U.S. CONST. art. IV, § 1.

for full faith and credit purposes, finality means that support installments already accrued are no longer subject to modification.[150]

> Support decrees entered in those states which hold that each installment of support constitutes a final judgment when it accrues are . . . constitutionally entitled to enforcement in all other jurisdictions as to such accrued and unpaid installments. *Decrees of those relatively few states which require the entry of judgment for arrears before the amount becomes finally due are not entitled to enforcement as a matter of constitutional rule until such a judgment is entered.*[151]

Indiana support orders are not retroactively modifiable,[152] but the Indiana Supreme Court declared in *Kuhn* that they were not final judgments either and that a judgment for arrears was necessary before an Indiana support order could be enforced. At the very least, this creates confusion in an area in which there is a crucial need for certainty. Evasion of support duties is a serious problem of national scope, and *Kuhn* unnecessarily complicates the already difficult task of securing interstate enforcement of Indiana support orders.

Kuhn has a similar effect as far as local enforcement is concerned. It mandates that before a delinquent support order can be enforced a judgment for arrears must be secured, whether or not such a judgment is necessary in order to ascertain the amount of the delinquency. In many cases in which payments are made through the court clerk, the amount of the arrears should be readily ascertainable without an evidentiary hearing. Indeed, that would seem to be the purpose of the statutory provision authorizing this method of payment.[153] To mandate a new judgment in every such case merely wastes the courts' time and assists delinquent parents in evading their support obligations. The court of appeals considered and discussed the local enforcement problems before concluding that support orders should be treated as final judgments and that a judgment for arrears should not be required in every case. The supreme court reversed without discussing these problems at all.

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[150]*E.g.*, Sistare v. Sistare, 218 U.S. 1 (1909). *See generally* CLARK, *supra* note 132, § 15.4 at 516-17. "To the extent that the [support] order is valid and final by the law of the state where it was originally entered it must be enforced by all other states." *Id.* at 516.

[151]CLARK, *supra* note 132, §15.4 at 517 (emphasis added).

[152]*E.g.*, Zirkle v. Zirkle, 202 Ind. 129, 172 N.E. 192 (1930); Jahn v. Jahn, 385 N.E.2d 488 (Ind. Ct. App. 1979).

[153]IND. CODE § 31-1-11.5-13(a), (b) (Supp. 1980).

Ironically, the lien problem which the supreme court considered so potentially "devastating" in *Kuhn* has been taken care of by a legislative amendment. A new statute provides that a delinquent support order cannot be made a lien on real estate unless a judgment for arrears has been entered or a certified copy of a judicial finding of the amount in arrears has been placed on the lis pendens docket of the court.[154] In cases where no lien on real estate is sought, there now is no reason whatsoever for the second judgment required by *Kuhn*, but the requirement will remain until the Indiana Supreme Court decides to reconsider that decision.

D. Dissolution of Marriage

1. Property Division.—Section 11 of the Indiana Dissolution of Marriage Act directs the court on dissolution to divide all property owned by either spouse, including property acquired prior to the marriage and property acquired by gift or inheritance during the marriage, "in a just and reasonable manner."[155] The statute defines property very broadly, at least with regard to the manner of its acquisition. Essentially *all* property acquired by either party at any time prior to separation is subject to division. The statute also gives the court broad powers with respect to the manner in which property can be divided. The court can divide property in kind, order it sold and divide the proceeds, or award all or part of it to one party and order *either* party to pay the other "such sum . . . as may be just and proper."[156] The language of section 11 suggests that the legislature intended the divorce court, sitting in equity, to have the broadest possible power and discretion to effect a "just and reasonable" division of property.[157] The only limits to that discretion imposed by the legislature are the five enumerated factors which must be considered by the court in "determining what is just and reasonable."[158]

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[154] *Id.* § 31-1-11.5-13(f).

[155] *Id.* § 31-1-11.5-11(b).

[156] *Id.* As written, the statute would authorize a cash award to a spouse, even though all of the parties' property had been awarded to that spouse. It states in part: "[T]he court shall divide the property of the parties . . . in a just and reasonable manner . . . by setting the same or parts thereof over to one (1) of the spouses and requiring *either* to pay such sum, either in gross or in installments, as may be just and proper . . . ." *Id.* (emphasis added). The restrictive interpretations given the statute by the courts would preclude this result, however, even in cases where the equities would seem to require it.

[157] *Id.*

[158] *Id.* The five factors are:

(1) the contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker;

A series of restrictive interpretations by the Indiana Court of Appeals has robbed section 11 of the flexibility necessary if the courts are to reach a just result in the many and varied fact situations which occur when parties' financial affairs must be disentangled upon dissolution of marriage. It is now impossible in some instances for the courts to carry out the legislative mandate to divide property "in a just and reasonable manner."[159] *Wilcox v. Wilcox*[160] superimposed upon the broad framework of section 11 an incongruously narrow definition of property, stating in effect that only a vested present interest in tangible property could qualify for division. *Wilcox* attempted to draw a hard and fast dividing line between property division and maintenance, stating that "any award over and above the [value of the] actual physical assets of the marital relationship must represent some form of support or maintenance"[161] which would violate the restrictions on maintenance contained in section 9(c).[162] The court thereby converted any division of intangible property into a forbidden award of maintenance and removed from the operation of section 11 all intangibles, including but not limited to pension rights and retirement pay.[163]

In *In re Marriage of McManama*,[164] the court of appeals distinguished *Wilcox* in affirming an award of $3,600 to the wife, even though it exceeded the value of the physical assets of the mar-

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(2) the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift;
(3) the economic circumstances of the spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell therein for such periods as the court may deem just to the spouse having custody of any children;
(4) the conduct of the parties during the marriage as related to the disposition or dissipation of their property;
(5) the earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

Id.

[159]*Id.*

[160]365 N.E.2d 792 (Ind. Ct. App. 1977).

[161]*Id.* at 794. No authority was cited to support this statement.

[162]IND. CODE § 31-1-11.5-9(c) (Supp. 1980). Section 9(c) prohibits maintenance awards unless a spouse is "physically or mentally incapacitated to the extent that the ability of such incapacitated spouse to support himself or herself is materially affected . . . ."

[163]*See, e.g.*, Savage v. Savage, 374 N.E.2d 536 (Ind. Ct. App. 1978). It is now impossible for a court to effect a just and reasonable division of property in any case where the only substantial asset is a pension. In cases where other assets exist, the pension rights can be "considered," but not divided, and an offsetting award of other property can be made. *See, e.g.*, Libunao v. Libunao, 388 N.E.2d 574, 577 (Ind. Ct. App. 1979).

[164]386 N.E.2d 953 (Ind. Ct. App. 1979), *rev'd* 399 N.E.2d 371 (Ind. 1980).

riage.[165] This award clearly did not represent any form of maintenance. It was given to the wife under a statute which directed the trial court to consider "the conduct of the parties . . . as related to the disposition or dissipation of their property"[166] to compensate her for sums actually expended on the husband's legal education. The court treated the $3,600 as the wife's share of marital assets "dissipated" for the sole benefit of the husband.[167] Without questioning the equity of the award, which should be the primary consideration under section 11, the Indiana Supreme Court reversed,[168] repeating without much discussion the *Wilcox* dicta: "[A]ny award over the value of the marital assets must represent some form of maintenance and since there was no showing of physical or mental incapacitation of appellee-wife pursuant to [section 9(c)] the court had no power or authority to make the award."[169]

Whatever validity this line of reasoning may have had in *Wilcox*, when the wife was seeking a share of the husband's future income, it makes no sense at all in the factual context of *McManama*. The $3,600 award bore no relationship to the wife's support needs, nor was it intended as "an award of the husband's future income,"[170] as the supreme court majority opinion states. The award undoubtedly would be paid out of future income, as would any cash award payable in installments,[171] but the court of appeals clearly did not intend to treat the husband's future income as an asset subject to division under section 11, the approach rejected in *Wilcox*. What the court of appeals apparently did intend to do was to ignore the *Wilcox* dictum limiting divisions of property to tangible assets, in order to avoid an inequitable result. The court of appeals refused to allow the *Wilcox* dictum to override section 11, which requires the court to consider dissipation of assets as one of the factors in effecting an equitable division of property.[172]

The supreme court's decision in *McManama* will lead to

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[165]All of the parties' tangible property was divided before the cash award was made. *Id.* at 954.

[166]IND. CODE § 31-1-11.5-11(b)(4) (Supp. 1980).

[167]386 N.E.2d at 955.

[168]*In re* Marriage of McManama, 399 N.E.2d 371 (Ind. 1980).

[169]*Id.* at 372.

[170]*Id.* at 373.

[171]IND. CODE § 31-1-11.5-11(b) (Supp. 1980) specifically authorizes cash awards, payable "either in gross or in installments." Any time property is awarded to one spouse with an offsetting cash award to the other, as contemplated by section 11, the cash award is likely to be paid out of future income. To read *Wilcox* as prohibiting any such award would completely emasculate section 11, and make property division impossible in any case in which property could not be either sold or divided in kind.

[172]*Id.* § 31-1-11.5-11(b)(4).

anomalous results in cases where there has been dissipation of marital property. If other property remains (that is, if the dissipation has been less than complete), the court may equitably award all or most of that property to the non-dissipating spouse. But under *McManama*, the amount of property available for distribution to the other spouse will decrease in inverse ratio to the magnitude of the dissipation. The greater the dissipation, the smaller the amount of property left for distribution. The lesson to the dissipating spouse is obvious: Do a thorough job; dissipate all of the property if you can, and nothing will be left to divide with your spouse. Can this be what the legislature intended when it mandated a just and reasonable division of property?

Justice Hunter's dissent in *McManama* argues that a professional degree should be treated as an intangible asset, subject to division as marital property.[173] Any difficulties in valuation of the asset can be avoided by looking "to the amount of money expended in achieving the degree,"[174] as the trial court did in *McManama*. This also avoids the treatment of future earnings as property, in violation of the holding of *Wilcox*, because the spouse's recovery is limited to restitution of sums actually expended by or for the other spouse.

> This is not an award of future income based upon a right of the wife in that income, or an enlargement of the marital estate beyond that property in which the parties maintain a present vested interest, but is a repayment of expended assets which is entirely proper for a court of equity to order.[175]

The specific problem of restitution for the spouse who pays for the other spouse's education is now covered by an amendment to section 11,[176] but the wider implications of *McManama* and *Wilcox* in other dissipation cases remain.

A case in point is *Armstrong v. Armstrong*[177] in which dissipation of assets was also a factor. During the marriage, the husband served time for passing bad checks, and the wife declared bankruptcy.

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[173]399 N.E.2d at 373 (dissenting opinion). A number of jurisdictions have treated professional degrees, or the increased earning power resulting therefrom, as assets subject to division. *E.g.*, *In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978); Inman v. Inman, 578 S.W.2d 266 (Ky. Ct. App. 1979). Justice Hunter argues that the "majority overly narrows the statute" (section 11) by refusing to treat professional degrees as property. 399 N.E.2d at 374.

[174]399 N.E.2d at 374-75.

[175]*Id.* at 375. "I feel it is clear that the holder of the degree has a present vested interest in the professional degree." *Id.* at 374.

[176]IND. CODE § 31-1-11.5-11(c) (Supp. 1980).

[177]391 N.E.2d 855 (Ind. Ct. App. 1979).

The parties' home had to be sold, and most of the $8,000 proceeds were used to retire the husband's worthless checks. At the time of the divorce, little property remained,[178] but the trial court nevertheless ordered the husband to pay the wife $8,000 as a division of property. The court of appeals reversed, holding that the trial court had abused its discretion because the cash award "was substantially in excess of the marital assets."[179] The court stated its belief that the "intent of the Legislature as set forth in the statute is clear. *While the law may result in inequities in some cases*, any change must come from the legislature."[180] One must implore the court to look at the statute again. Its expressed intent is to effect a "just and reasonable" division of property—that is, an *equitable* division. If the law results in inequities in some cases, that is a direct violation of the legislative intent. Such inequities result, not from the statute, but from the restrictive definition of property adopted by the courts, without any foundation either in the statute or in precedent.[181] As Judge Buchanan has observed in another context,

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[178]The husband owned only undivided one-half interests in an Arabian horse and a 1977 Pontiac, both owned jointly with a woman with whom he was living. There is no mention of any property owned by the wife at the time of the dissolution. *Id.* at 856.

[179]*Id.* at 857. Although *Armstrong* was decided before the supreme court reversed *In re* Marriage of McManama, 386 N.E.2d 953 (Ind. Ct. App. 1979), the second district court of appeals in *Armstrong* declined to follow the third district's reasoning in *McManama*, though conceding the "apparent equities" of the *McManama* decision. 391 N.E.2d at 857.

[180]391 N.E.2d at 857 (emphasis added).

[181]The court of appeals' pronouncement in *Wilcox* that "any award over and above the actual physical assets of the marital relationship must represent some form of support or maintenance," which effectively limits the division of property to tangible assets, was made without citing any authority whatsoever. 365 N.E.2d at 794. The subsequent repetition of this dictum in case after case has given it the aura of an axiom, accepted without reason and without question. Yet there is nothing in the statute itself to indicate that the legislature intended to exclude intangible assets from division under section 11, even when division of intangibles is necessary to achieve an equitable result.

The proposition that a "vested present interest must exist" before property can be divided was put forth in *Wilcox*, *id.* at 795, on the authority of Loeb v. Loeb, 261 Ind. 193, 301 N.E.2d 349 (1973), a case involving an interest in a trust probably best described as a vested future interest subject to divestment on the happening of a condition. This is hardly solid precedent for a concept which has exempted from division most forms of pensions and retirement plans, even when they constitute the only substantial asset acquired in a lengthy marriage. *See, e.g.*, Hiscox v. Hiscox, 385 N.E.2d 1166 (Ind. Ct. App. 1979). In another context, the court of appeals has said that "future interests are *valuable property rights*." Kuhn v. Kuhn, 385 N.E.2d 1196, 1200 (Ind. Ct. App. 1979) (emphasis added). One can only add that such valuable property rights as future interests, and all forms of intangible property, should be subject to the courts' equitable power under section 11. It is irrelevant that such rights usually cannot be divided in kind, since the court is empowered to divide property by setting it

courts should not permit themselves "to be bound in a strait jacket under the guise of intrinsic limitations. . . . [S]tatute[s] should be construed to prevent hardship or injustice."[182] This is particularly true when the statute itself expressly mandates a just result. "A dissolution action is an equitable proceeding; the statute should not be construed to lead to inequitable results."[183]

Equity does not necessarily mean equality in property division, especially when a brief marriage is involved. Section 11 does not expressly make the length of the marriage a factor to be considered by the court, but it does so indirectly. Section 11(b)(1) requires the court to consider "the contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker."[184] A spouse's contribution to the acquisition of property usually will be much greater in a long marriage than in a brief one. Section 11(b)(2) states that the court must consider "the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift."[185] The length of the marriage may well affect the weight to be given this factor. In a brief marriage, the fact that one spouse brought a greater amount of property into the marriage is an important consideration, but its impact may well diminish in a longer marriage.[186] In *Dahlin v. Dahlin*,[187] the parties were married less than four years and had no children. The husband contributed considerably more property to the marriage than did the wife. Although the husband's earning ability[188] was considerably greater than the wife's, he was due to retire on a $500 per month pension within a year and a half of the decree. Under these circumstances, the court of appeals held that a near-equal division of property was an abuse of the trial court's discretion and reversed a

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over to one spouse and ordering that spouse to pay a portion of its value to the other. IND. CODE § 31-1-11.5-11(b) (Supp. 1980). *See* note 156 *supra* and accompanying text.

[182]R.D.S. v. S.L.S., 402 N.E.2d 30, 36 (Ind. Ct. App. 1980) (Buchanan, J., dissenting), discussed *infra*, notes 265-75 and accompanying text.

[183]402 N.E.2d at 37.

[184]IND. CODE § 31-1-11.5-11(b)(1) (Supp. 1980).

[185]*Id.* § 31-1-11.5-11(b)(2).

[186][T]he effect of one spouse bringing a vast amount of property into a marriage must be considered by the court. However, the effect of that contribution may in a given case be largely discounted where the property is consumed by the parties during married life or where it, or its equivalent, is maintained or increased through the efforts of both during many years of marriage.

Osborne v. Osborne, 369 N.E.2d 653, 657 (Ind. Ct. App. 1978).

[187]397 N.E.2d 606 (Ind. Ct. App. 1979).

[188]The parties' earning ability and financial circumstances at the time of divorce are also factors to be considered by the court. IND. CODE § 31-1-11.5-11(b)(3), (5) (Supp. 1980).

decree awarding $44,000 to the wife and $43,000 to the husband.[189] The trial court had divided the property in the mistaken belief that section 11 required it to "equalize the parties' financial position upon a dissolution of their marriage."[190] The court of appeals found no such requirement in section 11, "nor any language which can be said to fairly imply such a requirement."[191]

An unequal division of property (60%/40% in favor of the husband) was affirmed by the court of appeals in *Davis v. Davis*.[192] The wife objected particularly to the trial court's awarding the family corporation, which encompassed most of the parties' income-producing assets, to the husband, with an offsetting cash award to the wife, even though the wife had made substantial contributions of time and money to the corporation. The court of appeals rejected her contention that the assets were divided in this way because she was a woman, holding that the award was justified because the husband had been solely responsible for the corporation in recent years, the corporation was his only source of income, and there was

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[189]397 N.E.2d at 608.

[190]*Id.* at 609. The trial court had stated in a memorandum: "The Court interprets [section 11(a)(3)] as *requiring some economic parity* of the spouses' position[s] after dissolution and that [section 11(a)(5)] permits the court to consider their earning ability to try to accomplish this result." *Id.* (emphasis added).

[191]*Id.* The unfairness of the trial court's economic parity approach was obvious in *Dahlin*, due to the brief marriage. The wife brought approximately $10,000 into the marriage; four years later, she walked out with $44,000. A higher degree of economic parity would be anticipated after a long marriage than after a brief one. The longer the marriage, the more reasonable it becomes for the court to find that the wife had "contributed" to the maintenance of the property or to the increase in its value under IND. CODE § 31-1-11.5-11(b)(1) (Supp. 1980).

It was economic parity that was the real problem in Wilcox v. Wilcox, 365 N.E.2d 792 (Ind. Ct. App. 1977), in which the wife sought to have the husband's future income treated as property. Implicit in her argument was the theory that courts should attempt to equalize the parties' income even after divorce. It was this theory which was erroneous, not the fact that future income (or present earning ability) constituted intangible property, or the fact that the husband (a tenured full professor) had no "vested present interest" in income to be earned in the future. Indiana law with respect to the division of property on divorce might have developed along far different, and more equitable, lines if the court had dealt with the problem in terms of economic parity, instead of attempting to redefine "property" in terms sufficiently narrow to exclude future income. The court's definition unfortunately is so narrow that it excludes dissipated property, pensions, and all other intangibles, and often forces courts to violate the letter and spirit of section 11.

[192]395 N.E.2d 1254 (Ind. Ct. App. 1979). The award would have been more nearly equal if the $100,000 cash award to the wife had been included in full rather than reduced to present value ($73,949), in which case the split would have been $256,825 for the husband to $229,577 for the wife. The court conceded, however, that the reduction to present value was proper, citing Burkhart v. Burkhart, 349 N.E.2d 707 (Ind. Ct. App. 1976).

evidence that the family businesses could "be operated most efficiently as a single unit."[193]

The wife also argued that the trial court abused its discretion by failing to order the husband to provide security for the cash award. Section 15 of the Dissolution of Marriage Act authorizes the court to provide for "security, bond or other guarantee . . . to secure the division of property."[194] The statute is permissive rather than mandatory, however, and even though the court of appeals was "troubled by the fact that Bonnie was dispossessed of her [corporate] holdings . . . in exchange for . . . an unsecured personal debt," it refused to hold that this was an abuse of the trial court's discretion.[195] Unless there was some indication in the record that the husband would be greatly disadvantaged by having to give security, it is difficult to see why the court of appeals did not protect the wife's interests by insisting on security in this case.

The court of appeals affirmed the division of property in *Dreflak v. Dreflak*,[196] even though the trial court had improperly ruled that property inherited by the husband during the marriage was "not marital property subject to disposition" under section 11.[197] Although the trial court improperly characterized the property, the court of appeals held in effect that the court properly awarded the property to the husband, while giving the wife somewhat more than half of the other property. The result was justified because the in-

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[193]395 N.E.2d at 1258. The wife also argued that she should have been compensated for her services to the corporation, but the court held there was evidence indicating she may have agreed to forego compensation for her work "in order to increase operating capital and encourage corporate growth." *Id.* at 1259. Therefore, the trial court might reasonably have concluded that she would be adequately compensated by the division of assets.

[194]IND. CODE § 31-1-11.5-15 (Supp. 1980).

[195]395 N.E.2d at 1259.

In two other cases decided during the survey period, the court of appeals affirmed unequal property divisions. In Johnson v. Johnson, 389 N.E.2d 719 (Ind. Ct. App. 1979), there was conflicting evidence as to the value of certain property. Whether the division was equal or not, and in whose favor, depended upon whose valuation was accepted, and the trial court made no findings concerning the disputed values. The court of appeals refused to reweigh the evidence and reiterated that the property division need not be equal in order to be equitable. *Id.* at 722.

In *In re* Marriage of Julien, 397 N.E.2d 651 (Ind. Ct. App. 1979), the division was 76/24 percent, in favor of the husband, and the evidence as to valuations was in conflict. The court of appeals affirmed, declining to "second guess the court and assume the role of fact-finder." *Id.* at 655.

[196]393 N.E.2d 773 (Ind. Ct. App. 1979). The property division was also unequal, in favor of the wife. How unequal it was depends on whose valuations are accepted. The split was $21,820 to $17,952 in the wife's version; it was $29,518 to $16,748 in the husband's, excluding the husband's inheritance. *Id.* at 774 n.1.

[197]*Id.* at 776 (emphasis deleted).

heritance was a business run by the husband's family which he had helped operate; it was received within a year before the parties separated, and its value was substantial in relation to the parties' other assets.[198] *Dreflak* merely confirms what the court of appeals indicated in *Osborne v. Osborne*,[199] that when an inheritance occurs near the date of separation, unless there are countervailing factors favoring the other spouse, the inheritance should be distributed to the inheriting spouse, with little, if any, counterbalancing distribution of other assets to the other spouse. The *Dreflak* trial court erred only in stating that it *could not* divide the inheritance along with the other property. What the court of appeals said in *Osborne* was that, in most such cases, the trial court *should not* divide a recently acquired inheritance. The difference is more than semantic. If the trial court's view were correct, the courts would lack the power to divide inherited property even in cases where strong countervailing equities existed. This would effectively nullify the provision of section 11 which defines property subject to division on dissolution to include inherited property.[200]

Property settlement decrees, except those based upon agreements of the parties, must be final; they are not subject to future modification by the courts.[201] Two cases decided by the court of appeals overturned property awards containing contingencies which destroyed their finality. In *Wilhelm v. Wilhelm*,[202] the trial court granted the wife a "property settlement judgment" of $126,000 which would terminate upon her remarriage.[203] The court of appeals reversed, holding that the termination provision "saddles [the wife] with an offensive restriction upon her personal activities and completely disregards the difference between property awards [and] alimony or maintenance."[204]

The contingent feature of the property award in *Henderson v. Henderson*[205] was a $5,500 lien granted the husband on real estate awarded to the wife. The lien was to be paid whenever the wife decided to sell the real estate, at which time the husband would also be entitled to up to $4,000 as his share of the parties' equity. When and whether the sale would take place was left entirely to the wife's

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[198] *Id.* "[T]he inherited interest would have comprised thirty-three percent to forty percent of the parties' net assets had it been totally included in the disposition." *Id.*

[199] 369 N.E.2d 653 (Ind. Ct. App. 1978).

[200] IND. CODE § 31-1-11.5-11(b) (Supp. 1980).

[201] *See id.* §§ 31-1-11.5-10(c), -17(a) (1976).

[202] 397 N.E.2d 1079 (Ind. Ct. App. 1979).

[203] *Id.* at 1080 (emphasis deleted). The termination provision was ineffective during the first ten years following the decree.

[204] *Id.*

[205] 401 N.E.2d 73 (Ind. Ct. App. 1980).

discretion. The court of appeals held that it was an abuse of discretion for the trial court to delegate to one of the parties the power to decide when, if ever, to divide the parties' property.[206]

2. Statutory Definitions.—A new legislative attempt to define property subject to division on divorce is unlikely to have much effect on the courts' treatment of intangible property under section 11. An amendment to the definition section provides: "The term 'property' means all the assets of either party or both parties, including a present right to withdraw pension or retirement benefits."[207] Although including "all the assets" in the definition of property arguably would require the courts to divide intangible property, the reference to "a present right to withdraw pension . . . benefits" permits a narrow interpretation. It may only serve to reinforce the courts' insistence on a "vested present interest."[208] At best, the amendment makes it clear that a pension plan that is "a fully vested fund of money under a defined contribution plan payable in a lump sum either on retirement or on resignation"[209] is subject to division on dissolution.[210]

An amendment to section 11 clarifies the provision which limits property subject to division on dissolution to that acquired "prior to final separation of the parties."[211] A new section 11(a) defines "final separation" as "the date of filing of the petition for dissolution of marriage."[212] Although it may be argued that this will encourage early filing of petitions in dissolutions, this provision should eliminate many difficult factual disputes concerning the date of separation.

3. Relief from Dissolution Decrees.—The court of appeals reversed trial court decisions denying petitions to set aside decrees in three cases decided during the survey period.[213] In *Pactor v. Pac-*

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[206]*Id.* at 74. The court cited two Colorado cases, Santilli v. Santilli, 169 Colo. 49, 453 P.2d 606 (1969), and Mock v. Mock, 508 P.2d 136 (Colo. Ct. App. 1973).

[207]IND. CODE § 31-1-11.5-2(d) (Supp. 1980).

[208]Wilcox v. Wilcox, 365 N.E.2d 792, 795 (Ind. Ct. App. 1977).

[209]Savage v. Savage, 374 N.E.2d 536, 539 (Ind. Ct. App. 1978). The court used this language to distinguish the kind of plan involved in Stigall v. Stigall, 151 Ind. App. 26, 277 N.E.2d 802 (1972) (decided under prior law) from the retirement benefits involved in *Savage*.

[210]Although such pension rights may not be divisible in kind, the "award" of the pension to the spouse who earned it could be offset by a cash award to the other spouse, regardless of the existence of other marital property. Under present law, an offsetting award to the other spouse can be made only to the extent that there is other tangible property subject to division. *See, e.g.*, Hiscox v. Hiscox, 385 N.E.2d 1166 (Ind. Ct. App. 1979); Savage v. Savage, 374 N.E.2d 536 (Ind. Ct. App. 1978).

[211]IND. CODE § 31-1-11.5-11(b) (Supp. 1980).

[212]*Id.* § 31-1-11.5-11(a). The former section 11(a) is now renumbered 11(b).

[213]In a fourth such case, *In re* Marriage of Jones, 389 N.E.2d 338 (Ind. Ct. App.

tor,[214] the wife sought to set aside a court order approving the parties' property settlement agreement and incorporating it into the dissolution decree, alleging that the husband had concealed property worth approximately $100,000.[215] The wife's petition was filed twenty-one months after entry of the dissolution decree, which would place it beyond the one-year limitation of Trial Rule 60(B)(3).[216] The court of appeals held, however, that section 17(a) of the Indiana Dissolution of Marriage Act[217] permits a property division decree to be set aside for fraud if the claim is asserted within two years of the order and that section 17(a) applies to decrees based on agreements of the parties as well as to court-ordered divisions of property.[218] The court further held that the allegations of fraud contained in the wife's petition were sufficiently detailed to satisfy Trial Rule 9(B).[219]

In *Rose v. Rose*,[220] the husband asked for relief from a decree under Trial Rule 60(B),[221] alleging that he had no notice of the final

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1979), the court of appeals affirmed the trial court's denial of relief under IND. R. TR. P. 60(B) to a husband who sought termination of monthly payments of $500 to the wife, under a property settlement agreement approved by the trial court and incorporated into their dissolution decree. The husband filed his motion for relief from judgment two and one-half years after the decree was entered, too late for relief from mistake under Trial Rule 60(B)(1), (8). The husband's argument that the trial court erred in accepting the parties' agreement "without establishing a factual basis for maintenance" should have been raised on appeal. 389 N.E.2d at 340. An error such as the husband alleged is cognizable under Trial Rule 60(B)(2) only if it could not have been discovered with due diligence, and only if the motion for relief is filed within one year. IND. R. TR. P. 60(B)(8).

[214]391 N.E.2d 1148 (Ind. Ct. App. 1979).

[215]*Id.* at 1149. The wife also asked the court to order an accounting, to hold a hearing to determine a fair division of the property, and to order the husband to pay her reasonable attorney fees. *Id.*

[216]IND. R. TR. P. 60(B)(3) provides that a motion for relief from judgment on grounds of "fraud . . . misrepresentation or other misconduct of an adverse party" must be made "not more than one [1] year after the judgment, order or proceeding was entered or taken."

[217]IND. CODE § 31-1-11.5-17(a) (Supp. 1980).

[218]*Id.* provides in part that "*orders as to property disposition entered pursuant to section 9* . . . may not be revoked or modified, except in case of fraud which ground shall be asserted within two (2) years of said order." (Emphasis added). The court of appeals held that orders "entered pursuant to section 9" included orders based on property settlement agreements as well as court-ordered divisions. 391 N.E.2d at 1150. Therefore, the wife's petition here was timely filed. *Id.* at 1151.

[219]IND. R. TR. P. 9(B) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be specifically averred." Even if the wife's petition had been deficient in this regard, the proper remedy would have been a motion for more definite statement or the use of discovery procedures, rather than outright dismissal. 391 N.E.2d at 1152 (citing State Farm Mut. Auto. Ins. Co. v. Shuman, 370 N.E.2d 941, 949-50 (Ind. Ct. App. 1977)).

[220]390 N.E.2d 1056 (Ind. Ct. App. 1979).

[221]IND. R. TR. P. 60(B).

hearing in the dissolution action filed by his wife. The trial court proceeded with the hearing and, based on wife's evidence alone, awarded her "a substantial share" of the marital property.[222] The husband claimed that the attorney he had hired in Kentucky (his new residence) had misinformed him concerning the hearing and concerning the hiring of local counsel in Indiana. Upon conferring with an Indiana attorney after the decree was entered, he petitioned the court to set aside the decree under Trial Rule 60(B) for "mistake, inadvertance, surprise or excusable neglect."[223] The trial court denied him relief, but the court of appeals reversed, holding that the Kentucky attorney's negligence should not be imputed to the client in "those instances where the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence."[224] Conceding that, in most cases, the attorney's negligence is imputed to the client and relief can only be granted when the neglect is excusable,[225] the court concluded that uncontroverted evidence in *Rose* indicated that the husband "was conscientious and diligent in his own right, but fell prey to unexplainable and inexcusable misfeasance and nonfeasance by [his] Kentucky attorney."[226] The husband was therefore "entitled to his day in court with respect to the disposition of the marital property."[227]

The wife in *Munden v. Munden*[228] was a patient in a mental health center at the time the husband filed his petition for dissolution of their marriage. The summons was served upon her by certified mail, addressed "c/o Administrator" at the mental health center. The return receipt was signed by a statistician at the center. There was no indication in the record that the complaint had been delivered to the wife or that she had been afforded the opportunity to retain counsel as required by Trial Rule 4.3.[229] The court of ap-

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[222]390 N.E.2d at 1057.

[223]*Id.*

[224]*Id.* at 1058 (quoting Buckert v. Briggs, 15 Cal. App. 3d 296, 301, 93 Cal. Rptr. 61, 63-64 (1971)).

[225]390 N.E.2d at 1058 (citing Moe v. Koe, 165 Ind. App. 98, 330 N.E.2d 761 (1975)).

[226]390 N.E.2d at 1058.

[227]*Id.* The court found that the husband had alleged sufficient facts to show that he had a meritorious defense to the action, as required by Trial Rule 60(B). *Id.* at 1057-58.

[228]398 N.E.2d 680 (Ind. Ct. App. 1979).

[229]*Id.* at 681-82. IND. R. TR. P. 4.3 provides:

> Service of summons upon a person who is imprisoned or restrained in an institution shall be made by delivering or mailing a copy of the summons and complaint to the official in charge of the institution. *It shall be the duty of said official to immediately deliver the summons and complaint to the person being served* and allow him to make provisions for adequate representation by counsel. *The official shall indicate upon the return whether the per-*

peals reversed a default decree awarded to the husband, holding that the requirements of Trial Rule 4.3 must be followed whenever the defendant is an inpatient in a mental institution, even though she entered voluntarily.[230] The trial court also erred in failing to appoint a guardian ad litem to represent the wife as required by Trial Rule 17(C).[231]

4. Collateral Attack on Decree.—In *Anderson v. Anderson*,[232] the parties had executed a property settlement agreement, but the dissolution decree entered three days later did not mention the agreement.[233] Less than a year later, the wife filed a separate action against the husband, an attorney, seeking damages for fraud and legal malpractice, alleging that he had discouraged her from hiring independent counsel and had misrepresented the value of the assets she received under the agreement. The trial court dismissed the wife's complaint on the ground that the dissolution decree was a final adjudication of the parties' property rights and could not be subjected to collateral attack.[234] The court of appeals affirmed, holding that the wife's only remedy was to seek a division of property in the original dissolution proceeding.[235] Because the dissolution court had made no division of property, that court retained "exclusive jurisdiction over the issue of the parties' property rights,"[236] and until the proposed division was effected, the wife could show no damages to sustain her claims for legal malpractice and attorney deceit.[237]

The court of appeals clearly was correct in holding that the trial

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son has received the summons and been allowed an opportunity to retain counsel.

(Emphasis added.)

[230]398 N.E.2d at 682.

[231]IND. R. TR. P. 17(C) provides in part: "If an infant or incompetent person is not represented, or is not adequately represented, the court *shall* appoint a guardian ad litem for him." (Emphasis added). The court of appeals further held that the husband had failed to make disclosure of the wife's mental condition, as required by IND. R. TR. P. 4.2(C), but stated: "The fact that summons was directed to appellant at a mental institution is sufficient to enjoin upon the court the duty to make inquiry and use the powers under [Trial Rule 17(C)] to 'make such orders as is deemed proper for the protection of such parties or persons.' " 398 N.E.2d at 682.

[232]399 N.E.2d 391 (Ind. Ct. App. 1979).

[233]The dissolution decree contained no order dividing the marital property, "nor any indication the agreement was submitted to the Court." *Id.* at 394.

[234]*Id.* at 395-96.

[235]Id. at 401. "In that proceeding the question of [the husband's] concealment or misrepresentation of the marital property will properly be in issue and the appropriate relief obtained." *Id.*

[236]*Id.*

[237]*Id.* at 401-04.

court retained jurisdiction to dispose of the parties' property rights after the dissolution decree was entered.[238] Under the Indiana statute, the court has a duty to effect a division of property on dissolution, whether or not the parties have agreed to a division,[239] and the *Anderson* trial court had not done so. It is not so clear, however, that a judicial division of property should be the exclusive remedy in this kind of case. In order to reach its conclusion, the court of appeals made two preliminary holdings. First, it followed prior law in holding that a divorce decree "operated as an absolute bar to maintaining an independent action involving property rights growing out of, or connected with, the marriage, *regardless of whether the divorce decree adjudicated the parties' property rights*."[240] Second, the court held that a property settlement agreement executed by the parties had "no legal efficacy" as a contract,[241] because it had not been approved by the dissolution court and incorporated and merged into the decree under section 10(b) of the Indiana Dissolution of Marriage Act.[242] Both of these holdings are highly questionable under present-day divorce law.

The court of appeals made it clear in *Anderson* that it was applying collateral estoppel or "issue preclusion" rather than res judicata ("claim preclusion").[243] Generally, collateral estoppel bars relitigation only of issues actually litigated in an earlier proceeding.[244] Yet, the Indiana rule applied in *Anderson* holds that a

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[238]*See* Lewis v. Lewis, 360 N.E.2d 855 (Ind. Ct. App. 1977).

[239]*See* Nagel v. Nagel, 130 Ind. App. 465, 165 N.E.2d 628 (1960). IND. CODE § 31-1-11.5-11(b) (Supp. 1980) provides that in a divorce action "the court *shall divide* the property of the parties." (Emphasis added.) *Id.* § 31-1-11.5-10(b) (1976) provides that, where the parties have agreed to a division of property, "the terms of the agreement if approved by the court *shall be incorporated and merged* into the decree, *or the court may make provisions* for the disposition of property." (Emphasis added.) In *Anderson*, the trial court neither approved the parties' agreement nor made its own provision for property division.

[240]399 N.E.2d at 397 (emphasis added; footnotes omitted). The court acknowledged that the rule is otherwise in most other jurisdictions. *Id.* n.11.

[241]*Id.* at 398.

[242]IND. CODE § 31-1-11.5-10(b) (1976).

[243]399 N.E.2d at 397 n.9A. The broader doctrine of res judicata would not have been applicable in *Anderson*, because the two suits involved were not on the same cause of action.

[244]The differences between res judicata and collateral estoppel were clearly set out in Town of Flora v. Indiana Serv. Corp., 222 Ind. 253, 53 N.E.2d 161 (1944). Where the subsequent suit is on the same cause of action as the first, the first judgment "is a complete bar to any subsequent action on the same claim or cause of action, between the same parties . . . . Every question which was within the issues, and which, under the issues, might have been proved, will be presumed to have been proved and adjudicated." *Id.* at 256, 53 N.E.2d at 163. Where the second suit between the parties is

divorce decree operates as an "absolute bar" to a later action involving marital property rights, even though those rights were not adjudicated in the divorce action.[245] This is an extraordinary application of collateral estoppel which should not be continued without first reexamining its rationale. The early cases enunciating this rule were decided under statutes and concepts of marital property rights materially different from those of today. Prior to adoption of the present Indiana Dissolution of Marriage Act, all property rights were settled by an award of alimony to the wife.[246] Alimony was considered incidental to the divorce action and had to be adjudicated in that action "or not at all."[247] After the divorce, the court was considered to have "lost jurisdiction" over the issue of property rights.[248] Today, however, the concept of divisible divorce recognizes separate and distinct jurisdictional bases for dissolution of marriage and for the incidents of marriage, including property rights.[249] In *Anderson*, the court of appeals expressly held that the divorce court still retained jurisdiction over the property issue five years after the decree was entered. This holding is inconsistent with the rationale of the early cases cited to support the collateral estoppel rule followed in *Anderson*.[250] Because the law now permits property rights to be determined long after the divorce decree has been entered, it makes no sense to continue applying a rule based on the

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on a different cause of action, however, the first suit is not a complete bar. In such a case, "it is well settled that the judgment in the first suit *operates as an estoppel only as to the point or question actually litigated and determined*, and not as to other matters which might have been . . . determined." *Id.* at 257, 53 N.E.2d at 163 (emphasis added). *See also* Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 2 (1942), *quoted in In re* Estate of Nye, 157 Ind. App. 236, 249-50 n.9, 299 N.E.2d 854, 862 n.9 (1973).

[245]399 N.E.2d at 397. This rule is derived from early Indiana cases, *e.g.*, Walker v. Walker, 150 Ind. 317, 50 N.E. 68 (1898); Wagner v. Treesh, 71 Ind. App. 551, 125 N.E. 242 (1919).

[246]*E.g.*, Smith v. Smith, 35 Ind. App. 610, 615, 74 N.E. 1008, 1010 (1905).

[247]Muckenberg v. Holler, 29 Ind. 139, 141 (1867). *See also* Smith v. Smith, 35 Ind. App. 610, 614, 74 N.E. 1008, 1010 (1905).

[248]*See* Wagner v. Treesh, 71 Ind. App. 551, 556, 125 N.E. 242, 243 (1919).

[249]*See, e.g.*, Abney v. Abney, 374 N.E.2d 264 (Ind. Ct. App. 1978), *cert. denied*, 439 U.S. 1069 (1979); *In re* Marriage of Rinderknecht, 367 N.E.2d 1128 (Ind. Ct. App. 1977). The concept of divisible divorce is derived from Estin v. Estin, 334 U.S. 541 (1948).

[250]In Walker v. Walker, 150 Ind. 317, 328, 50 N.E. 68, 71 (1898), the Indiana Supreme Court defended its holding that a divorce decree "must . . . be held to have adjudicated all property rights arising out of or connected with the marriage" by saying that its rule "is a salutary one, as it certainly would not be proper after the divorce, to leave open and unsettled questions in regard to property which the wife might have received from the husband during the marriage." These are precisely the kind of questions which the court of appeals now holds *are* left open and unsettled in cases, such as *Anderson*, in which the decree is silent as to the division of property.

assumption that all property rights had to be settled at the time the divorce was granted. Collateral estoppel should apply in divorce cases, as in all other cases, to bar only those issues actually litigated in the divorce action. Because property rights were not adjudicated in the *Anderson* divorce proceeding, the decree should not bar the wife's subsequent fraud suit against the husband.

Even if the collateral estoppel issue were resolved in the wife's favor, however, a second obstacle to her recovery would exist in the court's holding that no fraud action could be based upon the parties' property settlement agreement. The court considered the agreement to have no legal effect as a contract, because it had not been approved by the court and "incorporated and merged" into the divorce decree as contemplated by section 10(b) of the Dissolution of Marriage Act.[251] If it *had* been approved, incorporated, and merged into the decree, the agreement would indeed have lost its separate existence as a contract,[252] but no good reason appears for denying its legal efficacy as a contract in the absence of court approval. Section 10(a) encourages the parties to settle their differences by contract:

> To promote the amicable settlements of disputes that have arisen or may arise between the parties to a marriage attendant upon the dissolution of their marriage, *the parties may agree in writing* to provisions for the maintenance of either of them, the disposition of any property owned by either or both of them and the custody and support of their children.[253]

Nothing in section 10 expressly requires the parties to submit their agreement to the court. Section 10(b) merely states that *if* the agreement is approved by the court, it "shall be incorporated and merged into the decree";[254] otherwise, the court "*may* make provisions for the disposition of property, child support, maintenance and custody."[255] Because section 11 of the statute does state that the court "shall divide the property of the parties,"[256] the court of appeals undoubtedly was correct in holding that it was the "*mandatory duty*" of the trial court to divide the parties' property,[257] but nothing in the statute places a mandatory duty on the *parties* to submit their agreement to the court. Where the court has failed to

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[251]IND. CODE § 31-1-11.5-10(b) (1976); 399 N.E.2d at 398.

[252]*See* CLARK, *supra* note 132, § 16.14 at 565.

[253]IND. CODE § 31-1-11.5-10(a) (1976) (emphasis added).

[254]*Id.* § 31-1-11.5-10(b).

[255]*Id.* (emphasis added).

[256]*Id.* § 31-1-11.5-11(b) (Supp. 1980).

[257]399 N.E.2d at 398 (emphasis by the court).

fulfill its duty, as occurred in *Anderson*, it seems unnecessary to penalize the parties by treating their agreement as a legal nullity. Although the divorce court remains open for either party to seek a belated division of property, there is no reason to make this the exclusive remedy. The parties' agreement should be accorded at least prima facie validity as a contract, subject to the divorce court's power and duty to disapprove the agreement, if unfair, and make its own property division order. If a party elects to sue for fraud, as did the wife in *Anderson*, that remedy should be available to her.

E. Marriage

1. Domestic Violence.—A new statute establishes a fund to aid local government units and charitable organizations in setting up and maintaining centers for the prevention and treatment of domestic violence.[258] A ten-dollar surcharge added to the cost of every dissolution of marriage action will finance the program.[259] The interdepartmental board for the coordination of human services programs is authorized to make grants and enter into contracts for programs designed to establish prevention and treatment centers, establish personnel training programs, conduct research, or develop other means for prevention and treatment of domestic violence.[260] In order to be eligible to receive funds, a center must provide emergency shelter and transportation services, a twenty-four hour telephone system for crisis assistance, and other services to any person who has been assaulted by, or who "fears imminent serious bodily injury from [a] spouse or former spouse."[261]

The objective of the statute is laudable, although it is difficult to see the logic of requiring divorcing couples to finance the program. There are limitations on the grants allowed. No single domestic violence prevention and treatment center can receive more than $50,000 per year, or more than 75 percent of its operating costs.[262] It remains to be seen whether this will be adequate to maintain the kind of twenty-four hour emergency service and shelter facilities envisioned by the statute.

2. New Pre-Marital Tests.—Statutory amendments enacted over the governor's veto require tests for immunological response to rubella for all female marriage license applicants and Rh factor tests for applicants of both sexes, in addition to the tests for syphilis and

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[258]IND. CODE §§ 4-23-17.5-4, -5 (Supp. 1980).

[259]*Id.* § 4-23-17.5-4(b).

[260]*Id.* § 4-23-17.5-6.

[261]*Id.* § 4-23-17.5-7.

[262]*Id.* § 4-23-17.5-5(b).

sickle cell anemia already required.[263] The statute requires the examining physician to "explain the significance of the rubella and Rh factor test results" to the applicants.[264]

F. Paternity

1. Child Born During Marriage.—In *R.D.S. v. S.L.S.*,[265] the paternity issue arose in a dissolution of marriage proceeding. The child was born during the marriage but had been conceived before the parties met.[266] Although the wife admitted that the husband was not the child's biological father, the trial court found that the child "was born as a result of this marriage" and ordered the husband to pay child support.[267] The court of appeals reversed, holding that the duty of support could be imposed only upon a biological or adoptive parent,[268] because the Indiana Dissolution of Marriage Act defines "child" to mean "a child or children *of both parties* to the marriage."[269] A majority of the court concluded that the statute was determinative and commented that "without benefit of an appellee's brief, we are not in a position to consider the wisdom or application of any expansion of that statute."[270] This statement is inappropriate for two reasons: First, the dissent formulated the arguments on behalf of the wife as effectively as would a brief on her behalf;[271] second, application of an equitable doctrine such as estoppel would not have required expanding the statutory definition, because it would apply only to the facts and equities of this particular case. Liability could have been imposed on the husband in *R.D.S.* without reading the statute as imposing liability in all cases in which the wife gives birth to a child fathered by another man.[272]

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[263]*Id.* § 31-1-1-7.

[264]*Id.*

[265]402 N.E.2d 30 (Ind. Ct. App. 1980).

[266]At the time the parties met, the wife was visibly pregnant. They were married less than two months later. *Id.* at 31.

[267]*Id.*

[268]*Id.* at 34-35.

[269]IND. CODE § 31-1-11.5-2(c) (Supp. 1980) (emphasis added). The statutory definition includes "children born out of wedlock to such parties as well as children born or adopted during the marriage of such parties." *Id.* The child in *R.D.S.* was born *in* wedlock, but was admittedly not fathered by the husband.

> [H]ad husband sired the child, the child would have fallen within the [statutory] definition . . . regardless of whether she was born before the marriage, and hence born out of wedlock to the parties, or conceived before marriage but born after marriage, or conceived and born during marriage, or conceived during marriage but born after a dissolution of the marriage.

402 N.E.2d at 34.

[270]402 N.E.2d at 34.

[271]*Id.* at 35-38 (Buchanan, C.J., dissenting).

[272]*See id.* at 38 (Buchanan, C.J., dissenting).

In his dissent, Chief Judge Buchanan pointed to numerous facts which would justify holding the husband estopped to deny parentage in *R.D.S.*:

> Under the peculiar facts of this case, the only just result is to impose upon R.D.S. the support duty he willingly promised and undertook. When R.D.S. met S.L.S., she was *visibly pregnant*. When he proposed marriage to her, he urged her to drop a paternity suit for his own reasons: he did not want another man involved. He promised to care for her child, and he did so. He clearly undertook the responsibilities of a legal father, not as the result of any fraud. S.L.S. testified she "relied on his statements that he would take care of the child." . . . By the time the dissolution was granted, S.L.S. was precluded from bringing the paternity action.[273]

Judge Buchanan also pointed to the strong public policy favoring legitimacy of children and adequate provision for their support.[274] This policy certainly would be furthered by holding a husband estopped to deny paternity under the facts of *R.D.S.*[275]

2. Due Process.—Buck v. P.J.T.[276] arose under the former Indiana paternity statute which authorized issuance of a warrant "in lieu of summons."[277] Under the repealed statute, the court of appeals

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[273]*Id.* at 37 (Buchanan, C.J., dissenting) (emphasis in the original). Although it was still possible for the *child* to bring a paternity action, Chief Judge Buchanan thought that "[t]o shift this burden to the child, as R.D.S. suggests we should do, is wholly unjust. We could only speculate as to whether such paternity could be established, assuming the biological father could be found." *Id.*

The majority disputed Chief Judge Buchanan's statement that the husband had "promised to care for her child," *id.*, as not supported by the record. *Id.* at 35. Even if no direct promise was proved, the husband's conduct in asking the wife to drop a paternity suit against the putative father certainly implied his promise to care for the child. As the dissent pointed out, "R.D.S. took this child into his home and gave her his name *with full knowledge* of her biological paternity." *Id.* at 38.

[274]*Id.* at 37-38 (Buchanan, C.J., dissenting). "The interests of society in seeing that children are not bastardized subsequent to marriages, and in seeing that support is adequately provided must be taken into account judicially in carrying out legislative intent and fulfilling public policy." *Id.*

[275]The majority discussed several theories used by courts in other jurisdictions to justify imposing support obligations on husbands in fact situations similar to those of *R.D.S.* Theories included equitable adoption, equitable estoppel, in loco parentis, and promissory estoppel under RESTATEMENT (SECOND) OF CONTRACTS § 90 (tent. draft #2 1965). 402 N.E.2d at 32-33. All of these theories are variations on the theme of equitable estoppel, based on detrimental reliance on representations by the husband (either that he is the father or that he is willing to assume the duties of parenthood), making it unjust to allow the husband later to take a position inconsistent with paternity.

[276]394 N.E.2d 935 (Ind. Ct. App. 1979).

[277]IND. CODE § 31-4-1-13 (1976) (repealed effective October 1, 1979).

held, in *Neill v. Ridner*,[278] that the refusal of the trial court to recall outstanding warrants after valid service of summons had been made on a nonresident defendant violated his due process rights.[279] A majority of the court of appeals refused to apply the holding of *Neill* to a similar fact situation in *Buck*, because the defendant never specifically requested cancellation of the warrant after service of summons on him.[280] Judge Staton, in dissent, called the majority's attempts to distinguish *Neill* "specious."[281] In his view, it was the continuation of the warrant after good service had been obtained that constituted the denial of due process in *Neill* and in *Buck*. Once service was had, the warrant served "no legal purpose," and it was the denial of an opportunity to be heard without the "threat of incarceration" that constituted the violation of due process.[282] This problem should not arise under the present paternity statute which treats paternity strictly as a civil proceeding.[283]

3. Statutory Changes.—Amendments to the new paternity statute now authorize paternity actions to be filed by the state or county welfare department[284] in cases in which there has been an assignment of support rights under Title IV-D of the federal Social Security Act.[285] Where public assistance has been furnished for the benefit of the child, the statute of limitations for actions filed by the welfare department is extended from two years to five years.[286]

The new provision authorizing the court to order the parties to undergo human leukocyte antigen (HLA) tissue testing, as well as

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[278]153 Ind. App. 149, 286 N.E.2d 427 (1972).

[279]*Id.* at 156, 286 N.E.2d at 430 (construing U.S. CONST. amend. XIV, § 1; IND. CONST. art. I, § 12). The court also held in *Neill* that personal jurisdiction over the defendant was obtained by personal service upon him at his residence in Kentucky under IND. R. TR. P. 4.4(A)(2) ("causing personal injury or property damage by an act or omission done within the state"). 153 Ind. App. at 151-52, 286 N.E.2d at 428-29.

[280]394 N.E.2d at 937. The majority distinguished *Neill* on three grounds:

(1) The court in *Neill* had twice "specifically refused or failed to recall the outstanding warrants after a ruling that service had been made on the defendant," 286 N.E.2d at 431, whereas in *Buck*, the warrant was recalled when service of summons was attempted.

(2) When the warrant was reissued, there had been "no judicial determination of the adequacy of service." 394 N.E.2d at 937.

(3) At no point did Buck seek to have the warrant withdrawn.

[281]394 N.E.2d at 937 (Staton, J., dissenting).

[282]*Id.* at 938.

[283]*See* IND. CODE §§ 31-6-6.1-19, -7-4, -5 (Supp. 1980). An additional paternity case decided during the survey period dealt only with the sufficiency of the evidence. The court, in Moorehead v. Singleton, 403 N.E.2d 361 (Ind. Ct. App. 1980), held that the evidence supported the trial court's determination of paternity.

[284]IND. CODE § 31-6-6.1-2(b)(3) (Supp. 1980). *See also id.* §§ 31-6-6.1-6, -16.

[285]42 U.S.C. §§ 651-60 (1976 & Supp. II 1978).

[286]IND. CODE § 31-6-6.1-6(c) (Supp. 1980). The action must be brought "before the child's fifth birthday." *Id.*

the traditional blood grouping test, has been amended to make it clear that "the results of the tests may be received in evidence."[287] Under the former statute, the results of "grouping tests" could be received in evidence only to establish nonpaternity.[288] Under the new statute, blood tests and tissue tests apparently would be admissible to prove paternity, as well as to exclude it, reflecting significant advances made in such testing since 1953, when the former statute was adopted.

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[287]*Id.* § 31-6-6.1-8.

[288]*Id.* § 34-3-3-1 (1976) (repealed effective October 1, 1979). The results of such tests could "be received in evidence, but only in cases where definite exclusion [was] established." *Id.*

X. Evidence

HENRY C. KARLSON*

A. Impeachment

1. Standard for Determining Abuse of Discretion.—Two recent decisions deal with: (1) Factors to be considered in determining whether or not a defendant has been denied his constitutional right of effective cross-examination, and (2) matters which a defendant has the right to bring before the trier of fact for purposes of impeachment. Current Indiana law is to the effect that an accused is denied his right of confrontation on an impeachment issue only if there is a total denial of cross-examination.[1] Any lesser limitation is viewed as a regulation of the scope of cross-examination that is reviewable only for an abuse of discretion.[2] Opinions prior to *Haeger v. State*,[3] however, did not clearly state what factors were to be used in the determination whether there had been an abuse of discretion. *Haeger* casts some light on the factors to be considered in this important determination.

In *Haeger*, the defendant was convicted of driving while under the influence of intoxicating liquor. His conviction was based upon the arresting officer's testimony and the results of a Breathalyzer test administered by the officer.[4] On cross-examination of this critical witness, the defendant sought to show that the officer was under pressure to meet a quota of arrests. An objection as to the relevancy of this line of questioning was sustained by the trial court.[5] The appellate court correctly determined the objection was improperly sustained.[6] A witness' bias, prejudice, or ulterior motives are always relevant matters for inquiry on cross-examination.[7] Such

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[1]Borosh v. State, 166 Ind. App. 378, 336 N.E.2d 409 (1975); *see* Lagenour v. State, 376 N.E.2d 475 (Ind. 1978); Brooks v. State, 259 Ind. 678, 291 N.E.2d 559 (1973).

[2]In Borosh v. State, 166 Ind. App. 378, 383-84, 336 N.E.2d 409, 412-13 (1975), the court held:

> Thus, it is clear that only a total denial of access to such an area of cross-examination [bearing upon credibility of a witness] presents a constitutional issue. Any lesser curtailment of cross-examination by the trial court is viewed as a regulation of the scope of such examination, and such curtailment is reviewable only for an abuse of discretion.

[3]390 N.E.2d 239 (Ind. Ct. App. 1979).

[4]*Id.* at 242.

[5]*Id.* at 240.

[6]*Id.* at 242.

[7]"A witness may also be impeached by showing bias, interest, or hostility, for these qualities have a bearing on the credibility of the witness's testimony." E.

questions may lead the trier of fact to discount or completely disbelieve a witness. As noted by the court, however, the issue on appeal is whether the error was prejudicial.[8]

In *Haeger* the Indiana Court of Appeals adopted the holding from *Springer v. United States*[9] to create a three level standard of review for the determination of prejudice.[10] *Springer*, as adopted in *Haeger*, held:

> Where the record reflects a curtailment of a requested line of bias cross-examination *in limine*, so that the jury is unable properly to perform its fact-finding function in inferring bias from the testimony as a whole, we will assess cross-examination errors by a per se error standard. . . . If, however, the trial court has permitted some cross-examination so that the jury has sufficient information from which to infer bias (should it so choose), this court will evaluate error by application of the harmless constitutional error test . . . . To hold harmless such error in curtailing constitutionally-protected cross-examination, it must be clear beyond a reasonable doubt "(1) that the defendant would have been convicted

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IMWINKELRIED, P. GIANNELLI, F. GILLIGAN, F. LEDERER, CRIMINAL EVIDENCE 54 (1979) [hereinafter cited as IMWINKELRIED & GIANNELLI]. *See also* Acker v. State, 239 Ind. 466, 158 N.E.2d 790 (1959); Bryant v. State, 233 Ind. 274, 118 N.E.2d 854 (1954); C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 40, at 78-81 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]; E. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 70 (5th ed. J. Weinstein 1976); M. SEIDMAN, THE LAW OF EVIDENCE IN INDIANA 43-44 (1977).

[8] IND. R. TR. P. 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting relief under a motion to correct errors or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order or for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

See also FED. R. EVID. 103(a) which provides: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Where the ruling is one of constitutional error in the admission or exclusion of evidence, it must appear beyond a reasonable doubt that the error had no effect on the outcome. *See* Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976). *See generally* Milton v. Wainwright, 407 U.S. 371 (1972) (fifth and sixth amendments); Schneble v. Florida, 405 U.S. 427 (1972) (confrontation); Harrington v. California, 395 U.S. 250 (1969) (right of confrontation); Chapman v. California, 386 U.S. 18 (1967) (comment on failure to stand); Spano v. New York, 360 U.S. 315 (1959) (coerced confession).

[9] 388 A.2d 846 (D.C. 1978).

[10] 390 N.E.2d at 241.

> without the witness' testimony, or (2) that the restricted line of inquiry would not have weakened the impact of the witness' testimony." . . .
>
> Where we determine that a degree of cross-examination consistent with the Sixth Amendment has been allowed, our appellate review will focus on the scope of the cross-examination allowed, and the trial court's determination will stand unless an abuse of discretion mandating reversal is shown.[11]

Applying these standards to the denial of cross-examination in *Haeger*, the court determined the appellant was entitled to a new trial.[12] The defendant's conviction rested upon the credibility of the arresting officer's testimony. Although a Breathalyzer test administered by the arresting officer also indicated the appellant's intoxication, the accuracy of the test was dependent upon the officer following the correct procedures. The trial court's ruling that prevented any inquiry into possible pressure put on the officer to make arrests falls within the per se error standard created in *Springer*. The denial of the inquiry prevented the jury from performing its function as the trier of fact in inferring bias from the testimony as a whole. Consequently, the appropriate remedy for this prejudicial error was the granting of a new trial.[13]

Lusher v. State[14] involved a denial of cross-examination on matters that may impair a witness' ability to perceive and recall. In *Lusher*, voir dire of the prosecution's key witness outside the presence of the jury showed that during the period in which the alleged offense took place the witness was a heavy user of marijuana, hashish, L.S.D., mescaline and PCP.[15] The witness also admitted that in the year in question he was suffering from recurrences of the hallucinating effect, known as flashbacks, of L.S.D. He testified that "[W]hen you hallucinate, you can hallucinate anything you want to and it just happens like 'bang.'"[16] The witness was unable to recall if he was subject to flashbacks at the time of the alleged offense. Although the trial court did permit limited cross-examination on the question of whether the witness was under the influence of any drug at the time of the acts alleged, the defendant was not permitted to inform the jury of the witness' hallucinations.[17] The trial court's

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[11]388 A.2d at 856 (citations omitted).

[12]390 N.E.2d at 242.

[13]*Id.*

[14]390 N.E.2d 702 (Ind. Ct. App. 1979).

[15]*Id.* at 703.

[16]*Id.*

[17]*Id.* at 704.

denial of the opportunity to cross-examine the witness concerning his susceptibility to hallucinations was an abuse of discretion.[18]

The courts disagree on whether mere drug use is admissible for purposes of impeachment.[19] However, where drug use has substantially impaired a witness' ability to perceive or remember, courts generally agree the information should be considered by the trier of fact.[20] In *Lusher*, the accuracy of this witness' testimony was the key to the prosecution's case. Although the court held that exclusion of this evidence was prejudicial error, the court did not state what standard it used in reaching this determination.[21] A consideration of the factors used in *Haeger* demonstrates that the ruling in *Lusher* was correct.

The ruling of the trial court was one limiting, but not completely foreclosing, cross-examination on the question of the witness' ability to perceive and remember. This falls within the second level of review mandated in *Haeger*.[22] Applying that standard it cannot be said, beyond a reasonable doubt, that the defendant would have been convicted absent the witness' testimony or that the inquiry would not have weakened the impact of his testimony. The ruling was therefore prejudicial error.

2. Unconvicted Acts of Misconduct.—In *Chambers v. State*,[23] the Indiana Supreme Court held that a witness may not be cross-examined, for purposes of impeachment, concerning particular extraneous acts of misconduct which are not reduced to convictions.[24] Analysis of the opinion demonstrates that the rule stated in the opinion is not supported by the authorities cited and is improperly applied. The issue arose in *Chambers* when the defendant sought to

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[18]*Id.*

[19]For opinions favoring the admissibility of drug use for purposes of impeachment, *see* People v. Perez, 239 Cal. App. 2d 1, 48 Cal. Rptr. 596 (1965); People v. Strother, 53 Ill. 2d 95, 290 N.E.2d 201 (1972); People v. Talaga, 37 Mich. App. 100, 194 N.W.2d 462 (1971). For opinions not permitting mere drug use to be used for purposes of impeachment, *see* Doe v. State, 487 P.2d 47 (Alaska 1971); State v. Ballesteros, 100 Ariz. 262, 413 P.2d 739 (1966); People v. Ortega, 2 Cal. App. 3d 884, 83 Cal. Rptr. 260 (1969); State v. Goodin, 8 Or. App. 15, 492 P.2d 287 (1971). Indiana does not permit evidence of drug use or involvement for purposes of impeachment. Boles v. State, 259 Ind. 661, 291 N.E.2d 357 (1973); Otto v. State, 398 N.E.2d 716 (Ind. Ct. App. 1980).

[20]*See* Fields v. State, 487 P.2d 831 (Alaska 1971); People v. Smith, 4 Cal. App. 3d 403, 84 Cal. Rptr. 412 (1970); People v. Smith, 38 Ill. 2d 237, 231 N.E.2d 185 (1967); State v. Belote, 213 Kan. 291, 516 P.2d 159 (1973). *Cf.* United States v. Gregorio, 497 F.2d 1253 (4th Cir.), *cert. denied*, 419 U.S. 1024 (1974) (indicated that cautionary instructions on the *reliability* of a heroin addict-informer would be appropriate, but to include the words "inherently a perjurer" would be reversible error).

[21]390 N.E.2d at 704.

[22]*See* text accompanying note 11 *supra*.

[23]392 N.E.2d 1156 (Ind. 1979).

[24]*Id.* at 1160.

cross-examine the prosecution's principal witness concerning a charge pending against the witness in an unrelated case.[25] In upholding the trial court's termination of this line of cross-examination, the supreme court wrote:

> There was no showing that the charges pending against Mosier [the witness] in that case had anything to do with the plea agreement with the State involving his testimony and involvement in this case. The court properly sustained objections to said questions and answers. A witness cannot be impeached by proof of particular extraneous acts of misconduct which are not reduced to convictions. *Swan v. State*, (1978) Ind., 375 N.E.2d 198. *See Niemeyer v. McCarty*, (1943) 221 Ind. 688, 51 N.E.2d 365.[26]

In *Niemeyer v. McCarty*,[27] the court refused to admit into evidence the records of a contempt proceeding in which the plaintiff had been convicted of contempt of court for perjury. The court held proof of the contempt citation was not admissible because contempt of court was not a statutory offense and therefore not a crime.[28] However, the same opinion held that it *was* proper to ask the plaintiff the following question on cross-examination for purposes of impeachment: "You have been found guilty of contempt of court for perjury, have you not?"[29] It can be seen that the *Niemeyer* opinion supports the appellant in *Chambers*: if the act inquired into is pertinent to credibility, it is a proper subject of cross-examination.[30]

The opinion in *Swan v. State*[31] at first appears to be in agree-

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[25]*Id.*

[26]*Id.*

[27]221 Ind. 688, 51 N.E.2d 365 (1943).

[28]*Id.* at 692, 51 N.E.2d at 367.

[29]*Id.* at 700, 51 N.E.2d at 370. The court recognized it is proper on cross-examination to inquire into acts not resulting in convictions if they are relevant to credibility. The court wrote, "It is true that a judgment holding a person in contempt of court is not a conviction of a crime, but, where the basis of the judgment of contempt is perjury, it would seem pertinent upon the question of credibility." *Id.*

[30]*Niemeyer* is consistent with FED. R. EVID. 608(b) which provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of [a] crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness . . . .

See IMWINKELREID & GIANNELLI, *supra* note 7, at 60; MCCORMICK, *supra* note 7, § 42, at 82-84; 3A J. WIGMORE, THE LAW OF EVIDENCE §§ 981-984, at 838-54 (Chadbourn rev. 1970).

[31]268 Ind. 317, 375 N.E.2d 198 (1978).

ment with the holding in *Chambers*. In *Swan*, the court stated, "It has long been settled in this state that a witness cannot be impeached by proof of particular extraneous acts of misconduct, which are not reduced to convictions. *Neimeyer v. McCarty*, (1943) 221 Ind. 688, 51 N.E.2d 365; 3A Wigmore Evidence § 977-988 (Chadbourn Revision)."[32] As shown above, the opinion in *Niemeyer* would permit the questioning of a witness on cross-examination concerning acts of misconduct that had not resulted in convictions if the acts had some relation to credibility. Furthermore, reading the sections of *Wigmore* cited in *Swan* indicates another miscitation of authority by the *Swan* court. Sections 977-980a deal with proof of bad acts that have not resulted in convictions. These acts are used for impeachment, by methods other than cross-examination. The general rule is that extraneous acts of misconduct used solely for impeachment cannot be proved unless they have resulted in convictions. It is clear in sections 981-988, however, that *Wigmore* would permit cross-examination of a witness concerning extraneous acts of misconduct that weigh on credibility. Section 981 states: "The reasons already examined (§ 979 *supra*) appear plainly to have no effect in forbidding the extraction of the facts of misconduct from the witness himself upon cross-examination."[33]

Insofar as the opinion in *Chambers* rests upon the authorities cited, it is without foundation. Even if the general rule is accepted that extraneous acts of misconduct may not be used for impeachment,[34] the rule should have no application where the acts show a bias, interest or prejudice on the part of the witness.[35] In *Chambers*, further cross-examination could have demonstrated that the witness believed or hoped his testimony would lead the court or prosecution to be lenient with him on the pending charges. Because Indiana law forbids an offer of proof on cross-examination, it was not possible for the defendant to demonstrate what might have been shown by further examination of the witness.[36] To foreclose a defendant's questioning of a witness concerning matters which may give the witness an interest in testifying for the prosecution violates due process.[37]

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[32]*Id.* at 323, 375 N.E.2d at 202.

[33]3A J. WIGMORE, *supra* note 30, § 982, at 838.

[34]It does appear to be the rule that has been followed in recent Indiana decisions. *See* Swan v. State, 268 Ind. 317, 375 N.E.2d 198 (1978); Otto v. State, 398 N.E.2d 716 (Ind. Ct. App. 1980). This is a position accepted by a minority of courts. *See* MCCORMICK, *supra* note 7, § 42, at 82-84.

[35]*See* note 7 *supra*.

[36]Walker v. State, 255 Ind. 65, 262 N.E.2d 641 (1970), *overruled in part on other grounds*, Hardin v. State, 265 Ind. 616, 358 N.E.2d 134 (1976) (if an offer of proof is made on cross-examination, it may be ordered stricken); Wood v. State, 92 Ind. 269 (1883).

[37]*See* Davis v. Alaska, 415 U.S. 308 (1974).

3. Photographic Evidence.—The Indiana Court of Appeals in *Bergner v. State*,[38] on an issue of first impression, joined other jurisdictions[39] and the Federal Rules of Evidence[40] by adopting the silent witness theory of photographic evidence. Prior to *Bergner*, photographs were treated as a form of demonstrative evidence by Indiana courts.[41] As in the evidentiary use of models, maps and diagrams, photographs were only evidence to the extent they illustrated the testimony of a witness who had personal knowledge of the scene or matter depicted in the photograph. Instead of verbalizing his knowledge of what the photograph portrayed, the witness could adopt it as a substitute for his description by words. Typically this would be by testimony that the photograph was a true and accurate representation of the things it was intended to depict.[42] The photograph could speak for the witness, but it could not speak for itself.

In *Bergner*, the defendant's conviction for sodomizing his four-year-old daughter rested upon two photographs depicting the alleged act.[43] No eyewitness was available to testify that the photographs

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[38]397 N.E.2d 1012 (Ind. Ct. App. 1979).

[39]*E.g.*, Watkins v. Reinhart, 243 Ala. 243, 9 So. 2d 113 (1942); State v. Kasold, 110 Ariz. 558, 521 P.2d 990 (1974); People v. Bowley, 59 Cal. 2d 855, 382 P.2d 591, 31 Cal. Rptr. 471 (1963); Oja v. State, 292 So. 2d 71 (Fla. Dist. Ct. App. 1974); Franklin v. State, 69 Ga. 36 (1882); Cook v. Clark, 186 N.W.2d 645 (Iowa 1971).

[40]The comments to FED. R. EVID. 1002 state that the best evidence rule applies to photographs when "contents [of the photograph] are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture falls in this category. Similarly as to situations in which the picture is offered as having independent probative value, e.g. automatic photograph of bank robber." [sic]

[41]Williams v. State, 393 N.E.2d 183 (Ind. 1979), a case decided only three months before *Bergner*, illustrates this limited use of photographs. In *Williams*, the court held that a photograph which was admitted into evidence when a witness testified the photograph was that of a Mr. Hodges was prejudicial insofar as it showed Mr. Hodges to be wounded or dead. This was because no testimony at the time the photograph was admitted established that Mr. Hodges was dead or wounded. The photograph itself was not evidence of Mr. Hodges' condition because his condition had not yet been described by the witness. *See* Johnson v. State, 399 N.E.2d 360 (Ind. 1980); Wofford v. State, 394 N.E.2d 100 (Ind. 1979); Wilson v. State, 268 Ind. 112, 374 N.E.2d 45 (1978); Boone v. State, 267 Ind. 493, 371 N.E.2d 708 (1978); Green v. State, 265 Ind. 16, 349 N.E.2d 147 (1976); Murry v. State, 385 N.E.2d 469 (Ind. Ct. App. 1979).

[42]Photographs, like any other evidence, depend for their admissibility into evidence, upon relevance and competence. Usually the relevance of a photographic exhibit is self-portraying. Its competence must depend upon a proper identification as an accurate representation of that which it purports to portray. The verity of the identification depends upon the knowledge of the witness making the identification. If the witness has first hand information of the scene portrayed, it is immaterial that he came by his knowledge at a time differing from that at which it was photographically recorded.

Johnson v. State, 399 N.E.2d 360, 363 (Ind. 1980).

[43]397 N.E.2d at 1013.

were accurate representations of the alleged act.[44] In order to lay a foundation for the photographs' admission, an expert photograph examiner for the F.B.I. testified for the prosecution. He testified that the photographs were taken on Polaroid black and white film and were not composites or altered.[45] The prosecution also called the defendant's ex-wife, who identified the four-year-old daughter and the defendant as the persons shown in the photograph.[46] Her testimony also established, from the haircut of the daughter, that the photographs were probably taken in October, 1976. Testimony by these two witnesses was held to be sufficient to admit the photographs as substantive evidence.[47]

Although the court felt "it would be wrong to lay down extensive, absolute foundation requirements,"[48] it did provide some guidance for future trials. It recognized that photography is not an exact science. Whenever a photograph is used as evidence, there is a danger that the "quality of the camera and lens, type of film, available light, focal length of the lens, use of lens filters, or even the perspective from which the photograph is taken"[49] may distort the scene depicted. In order to minimize the danger of misrepresentation or manufactured evidence, the court required "proof the photograph [had] not been altered in any significant respect."[50] In addition, non-mandatory guidelines for the admission of photographs under the silent witness doctrine are suggested.

> The date the photograph was taken should be established in certain cases, especially where the statute of limitations or the identity and alibi of the defendant are in question. In cases involving photographs taken by automatic cameras such as Regiscopes or those found in banks, there should be

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[44]*Id.* at 1013-14.

[45]*Id.* at 1014. This method for authentication of a photograph was also used in People v. Doggett, 83 Cal. App. 2d 405, 188 P.2d 792 (1948).

[46]The ex-wife's testimony violated defendant's marital privilege. IND. CODE § 34-1-14-15 (Supp. 1980) provides in part: "The following persons shall not be competent witnesses: . . . Husband and wife, as to communications made to each other." Acts may be considered communications for purposes of this rule. Smith v. State, 198 Ind. 156, 152 N.E. 803 (1926). It has been applied subsequent to a divorce as to matters communicated during the marriage. Kreager v. Kreager, 192 Ind. 242, 135 N.E. 660 (1922). In light of other evidence identifying defendant as the person depicted, however, the error was harmless. As noted by the court, "[A]ny error in X's testimony was rendered harmless by virtue of appellant's display of his abdomen and thighs to the jury." Bergner v. State, 397 N.E.2d at 1020.

[47]397 N.E.2d at 1019.

[48]*Id.* at 1017.

[49]*Id.*

[50]*Id.*

> evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and chain of custody of the film after its removal from the camera.[51]

Unlike a witness who lays the foundation for the use of a photograph as demonstrative evidence, an expert whose testimony permits use of a photograph as substantive evidence has no personal knowledge of the facts depicted. He cannot be cross-examined concerning the event in question. In its opinion, the court compared this to an exception to the hearsay rule where the declarant is unavailable.[52] Once the proper foundation is laid for the exception, an out-of-court assertion is admissible even though the opponent of the evidence has no opportunity to cross-examine the declarant. The court's analogy is an apt one.

The defendant's conviction was properly sustained by the court. The illogic of limiting the use of photographs to illustrating the testimony of a witness was analyzed in a North Carolina Law Review article published in 1946.

> If a defective eye with a damaged optic nerve conveys an impression (gained in twilight or under deceptive visual conditions) to a diseased brain, even after the eroding effect of weeks have advanced the process of forgetting, the owner of the eye—though he may be a simple soul of limited intelligence and an even more limited vocabulary—will be permitted to describe in court what he *thinks* that he *remembers* that he *saw*; but, if a camera with cold precision and absolute fidelity records the view permanently and with minute accuracy that view is kept from the jury, perhaps . . . , or its use is sharply circumscribed. Such strange logic has a baffling, Alice-in-Wonderland quality far removed from the realistic directness of the man-of-the-street. Perhaps only the logic of the law, wrought from centuries of philosophic inbreeding and tortured at times by the real and apparent need of stretching or confining the implications of precedent could arrive at such a result.[53]

As recognized by the court in *Bergner*, "although a witness' testimony and a photograph suffer from some of the same maladies, the photograph is far superior in many respects."[54]

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[51]*Id.*

[52]*Id.* at 1018.

[53]Gardner, *The Camera Goes to Court*, 24 N.C.L. Rev. 233, 245 (1946).

[54]397 N.E.2d at 1018.

B. Hearsay

1. Res Gestae.—Indiana's *res gestae*[55] exception to the hearsay rule was the subject of an opinion by the Indiana Supreme Court in *Spears v. State*.[56] At the defendant's trial for assault with intent to kill and murder, four witnesses had been permitted to testify that the defendant's wife "came out of her room hysterically screaming that her husband had beaten Ramenda or that 'Harry did it.'"[57] While noting that a bystander's declaration is not admissible unless it is part of the *res gestae*,[58] the court found the wife sufficiently related to the occurrence to not be a mere bystander.[59] The court, however, was sympathetic to the defendant's objection that the wife had no personal knowledge of her husband's acts because she had not observed the alleged fatal fight.

Prior to the testimony of the four witnesses, the defendant requested an evidentiary hearing to demonstrate that the wife had not observed the alleged acts.[60] The trial court refused to grant this request. In his offer of proof, the defendant stated he would produce a statement that the defendant's wife gave to the police. In this statement she asserted that she did not see her husband beat the deceased.[61] Denial of this request was properly found to be in error.

A rule more ancient than the hearsay rule requires that a witness, or hearsay declarant, have first hand knowledge concerning the matters to which he testifies. With the exception of admissions

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[55]The first Indiana decision to use the term "res gestae" to describe an exception to the hearsay rule was Binns v. State, 57 Ind. 46 (1877). It is a term that has not been popular with commentators on the law of evidence. Professor Morgan, in Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 229 (1922) wrote: "The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as '*res gestae*.'"

[56]401 N.E.2d 331 (Ind. 1980).

[57]*Id.* at 336. This form of *res gestae* would fall within the excited utterance exception to the hearsay rule in federal courts. FED. R. EVID. 803(2). Although not discussed in the opinion, the use of the wife's statements did not violate defendant's marital privilege. This is true even though the wife could not have been called to testify against defendant without violating the privilege. Smith v. State, 198 Ind. 156, 152 N.E. 803 (1926). The declarant of an excited utterance need not be a competent witness in order for the statement to be admissible. *See* Robbins v. State, 73 Tex. Crim. 367, 166 S.W. 528 (1914). *See* MCCORMICK, *supra* note 7, § 297, at 704-09.

[58]Red Cab, Inc. v. White, 213 Ind. 269, 12 N.E.2d 356 (1938). Indiana's *res gestae* rule is different in this respect from FED. R. EVID. 803(2) which permits the use of the excited utterance of a bystander. *See* Annot., 78 A.L.R.2d 300 (1961).

[59]401 N.E.2d at 336.

[60]*Id.* at 337.

[61]*Id.*

and the entry of items in business records, a hearsay declarant must have personal knowledge of the matters contained in his declaration.[62] Professor Cleary writes:

> The common law system of proof is exacting in its insistence upon the most reliable sources of information. This policy is apparent in the opinion rule, the hearsay rule and the documentary originals rule. One of the earliest and most pervasive manifestations of this attitude is the rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact. The same requirement, in general, is imposed upon declarations coming in under exceptions to the hearsay rule, that is, the declarant must so far as appears have had an opportunity to observe the fact declared.[63]

As noted by the court, direct proof of the out-of-court declarant's personal observation is not necessary. "[I]t is sufficient if it appears inferentially that the declarant personally observed such matters and that there is nothing to make a contrary inference more probable."[64] However, when the opponent of a hearsay declaration offers to prove a lack of knowledge, it is error to deny the opportunity.

2. Business Records.—The appeal of a convicted bank robber in *Brandon v. State*[65] was denied because the Indiana Supreme Court held that business "records stored on a computer and electronically printed out" are admissible under the business records exception to the hearsay rule.[66] During his trial, the defendant objected to the admission of business office copies of microfiche records from the telephone company which showed all long distance calls that had been charged to a certain number.[67] A foundation for the records had been laid by testimony describing the manner in which telephone calls were automatically recorded on magnetic tape at the time each call was made and the manner in which the computer would later print out microfiche records for filing.[68] It was also shown "that the computer equipment used was a standard type of"

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[62]*See* FED. R. EVID. 602; G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 366-67 (1978); MCCORMICK, *supra* note 7, § 10, at 20-22.

[63]MCCORMICK, *supra* note 7, § 10, at 20.

[64]401 N.E.2d at 336-37 (quoting People v. Poland, 22 Ill. 2d 175, 183, 174 N.E.2d 804, 808 (1961)).

[65]396 N.E.2d 365 (Ind. 1979).

[66]*Id.* at 370.

[67]*Id.*

[68]*Id.* at 371.

system that "had been used by the company for several years."[69] Based on this testimony the trial court admitted into evidence the business office copy of the record. The court's opinion on this matter of first impression brings Indiana into conformity with holdings in other jurisdictions[70] and the Federal Rules of Evidence.[71]

As stated in the opinion: "Even though the scrivener's quill pens in original entry books have been replaced by magnetic tapes, microfiche files and computer print-outs, the theory behind the reliability of regularly kept business records remains the same and computer-generated evidence is no less reliable than the original entry books *provided a proper foundation is laid.*"[72] The unusual reliability of business records is created by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon the records, and by the need to make an accurate record as part of a continuing job or occupation.[73] These factors that make business records reliable do not depend on the form in which the records are kept. Considering error that may arise in any activity undertaken by a human being, a computer that automatically records an event may even add a new dimension to the reliability of business records.

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[69]*Id.*

[70]Merrick v. United States Rubber Co., 7 Ariz. App. 433, 440 P.2d 314 (1968); Grand Liquor Co. v. Department of Revenue, 67 Ill. 2d 195, 367 N.E.2d 1238 (1977); Commonwealth v. Hogan, 387 N.E.2d 158 (Mass. App. Ct. 1979); Ed Guth Realty Co. v. Gingold, 34 N.Y.2d 440, 315 N.E.2d 441, 358 N.Y.S.2d 367 (1974). *See also* Fenwick & McGonigal, *Admissibility of Computerized Business Records*, 15 JURIMETRICS J. 206 (1975); Roberts, *A Practitioner's Primer on Computer-Generated Evidence*, 41 U. CHI. L. REV. 254 (1974); Tapper, *Evidence from Computers*, 8 GA. L. REV. 562 (1974); *Law and Technology Symposium: Coping with Computer-Generated Evidence in Litigation*, 52 CHI.-KENT L. REV. 545 (1976).

[71]FED. R. EVID. 803(6), which deals with the business records exception to the hearsay rule, refers to "[a] memorandum, report, record, or data compilation, in any form." The advisory committee's note to this section states, "The expression 'data compilation' is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage." The term "data compilation" was taken from FED. R. CIV. P. 34(a).

[72]396 N.E.2d at 370 (emphasis added).

[73]Unusual reliability is regarded as furnished by the fact that in practice regular entries have a comparatively high degree of accuracy . . . because such books and records are customarily checked as to correctness by systematic balance-striking, because the very regularity and continuity of the records is calculated to train the recordkeeper in habits of precision, and because in actual experience the entire business of the nation and many other activities constantly function in reliance upon entries of this kind.

MCCORMICK, *supra* note 7, § 306, at 720. *See* G. LILLY, *supra* note 62, §§ 68-69, at 235-43 (1978); 5 J. WIGMORE, *supra* note 30, §§ 1517-1561.

In order to ensure the accuracy of computer-generated records, the court in *Brandon* required a three-part foundation for the evidentiary use of computer-generated business records.[74] First, "it must be shown that the electronic computing equipment" used to store the records was standard.[75] It appears the court assumed that a standard computer would be one that had proved its reliability through general acceptance by the business community. Second, the entries must have been "made in the regular course of business at or reasonably near the time of the happening of the event recorded."[76] This is a requirement for any business record that is to be received in evidence, whether stored on a computer or not.[77] The third part of the foundation is a general requirement "that the testimony satisfies the court that the sources of information and method and time of preparation were such as to indicate its authenticity and accuracy and justify its acceptance as trustworthy."[78] The third requirement, like the second, is one that may be applied to any business record, whether kept by hand or by computer.

3. Former Testimony.—In *Spence v. State*,[79] testimony taken in a civil proceeding was determined to be admissible as former testimony at a subsequent criminal trial. The defendant in *Spence* was convicted of assault, battery, cruelty and neglect of children. His conviction rested in part upon the admission, over objection, of a transcript of testimony given by one of his daughters, now deceased, at a prior civil hearing.[80] The testimony had been taken in a proceeding in which the Lake County Department of Public Welfare sought to obtain wardship of the defendant's two daughters. One of the acts

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[74]396 N.E.2d at 370. A more comprehensive foundation suggested by one commentator would require a showing that: 1) The business uses a computer; 2) the computer is reliable; 3) the business has developed a procedure for inserting data into the computer; 4) the procedure has built-in safeguards to ensure accuracy and identify errors; 5) the business keeps the computer in a good state of repair; 6) the business had the computer read out certain data; 7) the witness used the proper procedures to obtain the readout; 8) the computer was in working order at the time the witness obtained the readout; 9) the witness recognizes the exhibit as the readout; 10) the witness explains how he or she recognizes the readout; 11) if the readout contains strange symbols or terms, the witness explains the symbols or terms for the trier of fact. E. IMWINKELREID, EVIDENTIARY FOUNDATIONS 63-64 (1980).

[75]396 N.E.2d at 370.

[76]*Id.*

[77]*See* FED. R. EVID. 803(6); G. LILLY, *supra* note 62, § 68, at 235-36; MCCORMICK, *supra* note 7, §§ 308-309, at 722-24.

[78]396 N.E.2d at 370. The language is similar to the provisions of FED. R. EVID. 803(6) that records of a regularly conducted activity are admissible, "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

[79]393 N.E.2d 277 (Ind. Ct. App. 1979).

[80]*Id.* at 279.

alleged in the Department's petition was a knife attack by the defendant on one of his daughters.[81] Counsel who represented Mr. Spence at the wardship hearing also represented him at the later criminal trial.[82] In *Spence*, the court of appeals correctly held defendant's objection to the receipt of the transcript was properly overruled.[83]

Former testimony, unlike other hearsay exceptions, does not rely upon circumstances to provide the guarantees of trustworthiness usually furnished by cross-examination and oath; both oath and the opportunity to cross-examine were present when the former testimony was taken. In civil trials, it is only due to the importance of demeanor evidence, available only when the witness is before the trier of fact, that former testimony as an exception to the hearsay rule is limited to situations in which the witness is unavailable.[84] A defendant's sixth amendment right of confrontation also limits reception of former testimony in criminal trials to circumstances where the witness is actually unavailable.[85] The court in *Spence* lists four factors to be used in determining the admissibility of former testimony: 1) Was the witness under oath at the prior proceeding? 2) Was the prior proceeding before a judicial tribunal equipped to provide a judicial record? 3) Was the defendant represented by counsel at the prior proceeding? and 4) Was the defendant offered every opportunity to cross-examine the witness concerning the statement.[86] As noted in the opinion,

> The critical determination to be made is whether there was sufficient identity of parties and issues between the former and present proceedings. . . . Absolute identity is not required, only sufficient identity to insure that cross-examination in the former case was directed to the issues presently relevant and that the former parties were the same in nature and interest.[87]

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[81] *Id.*

[82] *Id.* at 281.

[83] *Id.*

[84] Professor Seidman in his work on Indiana evidence states:

> Technically it is hearsay only because of the lack of the personal presence of the witness at the present trial so that the jurors may observe his demeanor. Since there is a strong policy favoring the personal presence of the witness for demeanor evaluation, in order for his former testimony to be received, it is necessary to demonstrate to the trial judge the unavailability of the witness . . . .

M. SEIDMAN, *supra* note 7, at 115-16 (footnote omitted).

[85] Mancusi v. Stubbs, 408 U.S. 204 (1972); Berger v. California, 393 U.S. 314 (1969); Barber v. Page, 390 U.S. 719 (1968).

[86] 393 N.E.2d at 280-81.

[87] *Id.* at 281 (citations omitted).

Testimony given by defendant's daughter at the wardship proceeding was subject to cross-examination by the defendant's legal counsel.[88] The critical issues to be determined at the hearing were similar to those before the court at the criminal trial. In each case the defendant had a similar motive to develop the facts and attack the credibility of the witness. Thus, reception of the former testimony violated neither the hearsay rule nor Mr. Spence's right of confrontation.[89]

C. Judicial Notice

The unusual application of the doctrine of judicial notice in *Owen v. State*[90] is in conflict with the generally accepted legal theory underlying the doctrine. In a trial by jury the appellant in *Owen* was convicted of committing a felony while armed. At the request of the prosecution, the court took judicial notice that the defendant, who acted *pro se* in the trial, had signed the defense pleadings and motions;[91] however, no evidence was offered that defendant had in fact done so. Signatures and other handwriting in the defense pleadings were then used by an expert witness and the jury for comparison with a handwritten note left at the scene of the crime.[92] On appeal the supreme court upheld this use of judicial notice, holding,

> It does not seem unreasonable under the circumstances of this case, for the court to take judicial notice of the fact that the defendant is the one who did in fact, sign these pleadings. The trial judge may take judicial notice of such a fact, and a rebuttable presumption arises which requires the defendant to come forward with any evidence to dispute the presumption.[93]

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[88] *Id.*

[89] The testimony would also have been admissible in a federal court. FED. R. EVID. 804(b)(1) provides:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The testimony was also properly admitted under prior Indiana decisions. *See* Kimble v. State, 387 N.E.2d 64 (Ind. 1979); Livi v. State, 182 Ind. 188, 104 N.E. 765 (1914). *See generally* MCCORMICK, *supra* note 7, §§ 254-261, at 614-27.

[90] 396 N.E.2d 376 (Ind. 1979).

[91] *Id.* at 381.

[92] *Id.*

[93] *Id.*

Authority for this holding is found by the court in *Sumpter v. State*.[94] In *Sumpter*, the court held that it will take judicial notice of the defendant's sex when the sex of the accused is an element of an offense.[95] As in *Owen*, the judicial notice in *Sumpter* creates a rebuttable presumption.[96] Although the holding in *Sumpter* sanctions the use of a rebuttable presumption created by judicial notice,[97] a doctrine rejected by the writers of the Federal Rules of Evidence,[98] it does not support the use of judicial notice in *Owen*.

The doctrine of judicial notice is an alternative to the formal presentation of evidence. When judicial notice is taken of a matter, the parties need not present evidence and the trial judge informs the jury of the fact's existence.[99] Modern law, however, as illustrated by Federal Evidence Rule 201(b), recognizes two independent bases for judicial notice.[100] Federal Evidence Rule 201(b) provides: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

In *Sumpter*, it was proper to take judicial notice of a defendant's sex. The sex of a person is a matter that is not subject to reasonable dispute, and if dispute does arise, the sex can be easily determined. Unlike the sex of an individual, however, the authorship of the

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[94]264 Ind. 117, 340 N.E.2d 764, *cert. denied*, 425 U.S. 952 (1976).

[95]*Id.* at 123-24, 340 N.E.2d at 768-69.

[96]*Id.* at 123, 340 N.E.2d at 768-69.

[97]Authorities do not agree on whether or not the fact judicially noticed must be accepted by the jury as conclusively established. *See* Keefe, Landis & Shand, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664 (1950); McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779 (1961); Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944).

[98]FED. R. EVID. 201(b) provides in part: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In commenting on this rule the advisory committee wrote, "[W]ithin its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof." P. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 47 (1980). As enacted, however, due to a belief the judge should not have the power to order the finder of fact to find any fact necessary for conviction, the rule as enacted permits evidence to the contrary to be put before the jury at a criminal trial but not at a civil trial. FED. R. EVID. 201(g); FEDERAL RULES OF EVIDENCE OF UNITED STATES COURTS AND MAGISTRATES 16 (Report of House Committee on the Judiciary) (West 1979).

[99]MCCORMICK, *supra* note 7, § 328, at 757-60.

[100]Matters of common knowledge within the territorial jurisdiction of the court and facts capable of certain verification are generally accepted as proper for judicial notice. MCCORMICK, *supra* note 7, §§ 329-330, at 760-66.

pleadings and filings of the defense in *Owen* was not a matter beyond reasonable dispute. Although the facts of the case strongly suggest the defendant's authorship, it cannot be said his authorship was a matter of common knowledge within the territorial jurisdiction of the court. Furthermore, it is doubtful that the prosecution could have proven the defendant's writing of the documents by resorting to sources of undisputable accuracy. The defendant's authorship should have been submitted to the jury as an issue to be resolved based upon evidence that the defendant was acting *pro se*.

D. The Original Document Rule

In order to prove damages arising from alleged medical malpractice, the plaintiff in *Davis v. Schneider*[101] sought to give oral testimony concerning the amount of a bill for services which was submitted by the Chicago Rehabilitation Institute. Prior to testifying, the plaintiff made no effort to account for her copy of the bill or to procure a copy of the original of the bill from the Institute.[102] Upon proper objection, plaintiff's testimony was correctly refused by the court;[103] its reception would have violated the best evidence rule.

The best evidence rule, or more specifically, the original document rule, provides, "[I]n proving the terms of a writing where the terms are material, the original writing must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent."[104] A party seeks to prove the terms of a document, within the meaning of the best evidence rule, when he attempts to prove a fact by referring to a document recording that fact. This is true even though the fact could have been proven without reference to the writing.[105] Because the plaintiff in *Davis* sought to show the amount of a "bill" (a writing) as evidence of expenses incurred, the court properly applied the best evidence rule in excluding her testimony. A change in the form of plaintiff's testimony, however, would have made it admissible. The plaintiff should have merely sought to relate expenses or debts incurred as the result of

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[101]395 N.E.2d 283 (Ind. Ct. App. 1979).

[102]*Id.* at 291.

[103]*Id.*

[104]MCCORMICK, *supra* note 7, § 230, at 560; *see* FED. R. EVID. 1002 which provides: "To prove the content of a writing . . . the original writing . . . is required, except as otherwise provided in these rules or by Act of Congress."

[105]The advisory committee's note to FED. R. EVID. 1002 states:

> Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies.

her injuries and made no reference to the "bill." The best evidence rule would not have prevented her testimony because expenses and debts are matters which exist independently of any writing. Proof of facts that exist independently of any writing may be made by testimony of a witness, even though the facts could be proven by use of documents.[106] It is only when a fact is to be proven by reference to a writing, or the contents of the writing are themselves the facts sought to be proven, that the best evidence rule applies.

E. Competency

The Indiana Supreme Court, denying a convicted murderer's appeal in *Pavone v. State*,[107] upheld the use of a witness whose memory had been enhanced by hypnosis.[108] In his offer of proof, the appellant merely stated that he would show the witness had been hypnotized, and that it was not possible to tell how much of his testimony was his own recollection and how much of it was a result of suggestions made to him.[109] This offer of proof was denied. Although from the record it appears that defendant had all the statements, including videotaped statements, taken while the witness was hypnotized, his offer of proof did not establish the manner in which the testimony was influenced. It merely speculated that the testimony was tainted.[110]

The decision of the court is in accord with the law established in other jurisdictions. The general rule is that a combination of an opportunity for cross-examination of the witness and the availability of expert testimony on the contaminating effect of hypnosis on memory, enables the trier of fact to give proper weight to the testimony. *Harding v. State*,[111] a 1968 decision of the Maryland Court of Appeals, was the first reported decision to deal with the use of hypnosis for enhancing a witness' memory. *Harding* set the trend for subsequent rulings in other jurisdictions that hypnotism affects *credibility* but not the *admissibility* of evidence.[112] Two federal court

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[106]McCORMICK, *supra* note 7, § 233, at 563-65.

[107]402 N.E.2d 976 (Ind. 1980).

[108]*Id.* at 980.

[109]*Id.* at 979.

[110]*Id.* at 979-80.

[111]5 Md. App. 230, 246 A.2d 302, *cert. denied*, 395 U.S. 949 (1968).

[112]Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974); Connolly v. Farmer, 484 F.2d 456 (5th Cir. 1973); People v. Smrekar, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979); State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978); State v. Brom, 8 Or. App. 598, 494 P.2d 434 (1972). These cases should be distinguished from those in which statements made during a hypnotic trance are offered as evidence of the facts alleged. Courts consistently exclude such evidence. Annot., 92 A.L.R.3d 442, 454 (1979).

of appeals' decisions have, however, indicated that some procedural requirements need to be established in order to prevent the abuse of hypnotic refreshment. In *United States v. Miller*,[113] the United States Court of Appeals for the Second Circuit held that the defense must be notified if a witness has had his memory enhanced by hypnosis.[114] Almost ten years after *Miller*, the United States Court of Appeals for the Ninth Circuit in a footnote wrote:

> We think that, at a minimum, complete stenographic records of interviews of hypnotized persons who later testify should be maintained. Only if the judge, jury, and the opponent know who was present, questions that were asked, and the witness's responses can the matter be dealt with effectively. An audio or video recording of the interview would be helpful.[115]

The defendant in *Pavone* was provided with all the safeguards recommended by the Second and Ninth Circuit Courts of Appeals. Until it is established that hypnosis taints a witness' testimony in a manner that cannot be properly weighed by the trier of fact, its use should not affect the admissibility of testimony.

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[113]411 F.2d 825 (2d Cir. 1969).

[114]*Id.* at 832.

[115]United States v. Adams, 581 F.2d 193, 199 n.12 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978).

XI. Insurance

JANET W. AVERETT
JOHN C. TRIMBLE

A. Issuance and Delivery

1. Conditional Receipt for Temporary Life Insurance.—During the survey period a new twist was added to the law of Indiana with respect to the duration of the interim life insurance coverage created by an insurer's giving of a conditional receipt.[1] In *Hornaday v. Sun Life Insurance Co. of America*,[2] the plaintiff was the beneficiary named on an application for life insurance which her husband had submitted to a salesman for the defendant insurance company. At the time of the application, the decedent had paid a small premium and had received a conditional receipt. Subsequently, the company approved the application and issued a policy. However, all efforts by company salesman to deliver the policy and to collect the full premium were rebuffed by the plaintiff's decedent and he died before delivery could be made.[3]

Plaintiff made a claim against the policy which was denied by Sun Life on the basis that no delivery had occurred, and that no premium had been tendered by plaintiff's decedent nor had any been collected by the company. In the breach of contract action brought by the plaintiff, the district court ruled that, although the conditional receipt had created life insurance coverage for the decedent, "it had expired by its own terms 60 days from the date of insurance application . . . , and was not in effect when Hornaday died . . . over 100 days after the insurance application date."[4]

On appeal, Mrs. Hornaday relied upon the Indiana cases of *Kaiser v. National Farmers Union Life Insurance Co.*[5] and *Monumental Life Insurance Co. v. Hakey*,[6] which stated "that a temporary insurance contract can be terminated in Indiana only upon (1)

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[1]Indiana follows the general rule that once an insurance company accepts a premium for life insurance and issues a receipt, a contract arises. Coverage may not be terminated unless the insurer notifies the applicant and returns the premium during the applicant's lifetime. *See generally* Monumental Life Ins. Co. v. Hakey, 354 N.E.2d 333 (Ind. Ct. App. 1976); Kaiser v. National Farmers Union Life Ins. Co., 167 Ind. App. 619, 339 N.E.2d 599 (1976).

[2]597 F.2d 90 (7th Cir. 1979).

[3]*Id.* at 91-92.

[4]*Id.* at 92.

[5]167 Ind. App. 619, 339 N.E.2d 599 (1976).

[6]354 N.E.2d 333 (Ind. Ct. App. 1976).

notice of such termination by the insurance company to the applicant, and (2) a return of the consideration paid."[7]

The appellant argued that there were strong social policy reasons for supporting the rules of *Kaiser* and *Monumental*, inasmuch as Indiana courts have sought to discourage insurance companies from retaining "unearned premiums yet refusing to provide coverage."[8] Further, Hornaday contended that the insurer's attempts to deliver the policy after the sixty days had expired constituted a waiver of the company's right to rely on the expiration of the conditional receipt.[9]

Although the court recognized and agreed with the policy reasons for supporting *Kaiser* and *Monumental*, it found precedent for permitting a conditional receipt to expire by its own terms.[10] Sun Life had presented the 100 year old Indiana case of *Barr v. Insurance Co. of North America*,[11] a fire insurance case, which had absolved an insurance company of liability where " '[t]he written contract of assurance expired by its own limitation, before the loss occurred . . . .' "[12] The court of appeals agreed with the district court that there was no cogent reason for distinguishing between fire insurance and life insurance because both were contracts.[13] In examining the language of the conditional receipt at issue,[14] the court adopted the district court's findings, and agreed that the terminology used was "unambiguous and obvious" and was "not a hidden phrase filled with legal technicalities buried within the small print of the contract."[15] The court's most compelling reason for re-

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[7]597 F.2d at 92 (citing Monumental Life Ins. Co. v. Hakey, 354 N.E.2d 333 (Ind. Ct. App. 1976); Kaiser v. National Farmers Union Life Ins. Co., 167 Ind. App. 619, 339 N.E.2d 599 (1976)). The company did send the plaintiff a check representing the amount of the temporary premium after receiving notice of the death. However, the plaintiff refused to accept it, and the court found it had no bearing upon the issue of the expiration of the conditional receipt. 597 F.2d at 92.

[8]597 F.2d at 94.

[9]*Id.*

[10]*Id.* at 92 (citing Barr v. Insurance Co. of N. America, 61 Ind. 488 (1878)).

[11]61 Ind. 488 (1878).

[12]597 F.2d at 92 (quoting 61 Ind. at 493).

[13]597 F.2d at 92 (quoting district court opinion).

[14]The pertinent language of the conditional receipt was as follows:

(A) . . . If the amount received was less than the full first premium, the insurance provided will be for (1) a period equal to such proportionate part of the first premium interval as the cash so paid bears to the full first premium or (2) a period of 60 days, whichever is longer. . . .

(C) Except as provided in this conditional receipt, any policy issued by the Company shall not take effect until it is delivered and the full first premium for it is paid during the lifetime and continued insurability, as stated in the agreement contained in the application, of the Proposed Insured.

597 F.2d at 91.

[15]*Id.* at 94.

jecting the appellant's application of the rules in *Kaiser* and *Monumental* was found in a suggestion by the district court:

> The application of plaintiff's interpretation of *Monumental* and *Kaiser* would effectively mean that once a conditional receipt is executed insurance coverage is in effect *ad infinitum*, regardless of the amount of the consideration tendered, unless notice of termination is given and the consideration returned. Hence, if the insured successfully avoids contact with the insurer, insurance coverage is in effect indefinitely regardless of the amount of the consideration paid. The result could be that in exchange for $12 or $15 an insured is effectively covered for as long a period as he can avoid contact with the insurer when an actual monthly premium would be much greater than the amount tendered if a regular insurance contract were issued.[16]

Finally, the court held that Sun Life did not waive the expiration of the interim insurance coverage by diligently continuing to attempt to deliver the policy after the sixty day limit.[17] It noted that such diligence would be expected of the insurance salesman. Besides, had the diligence paid off with delivery of the policy after the sixty day period, no harm would have resulted because coverage would have been immediately reinstated and would have been in force upon the insured's death.[18]

Under the facts of *Hornaday* the ruling seems entirely reasonable and the result not unjust. However, one could ask whether the court would have reached the same conclusion had the company been less diligent and the proposed insured less evasive. Insurance companies may now be expected to more frequently include automatic expiration clauses in their conditional receipts. Such theories as waiver and equitable estoppel will have to be employed by the courts to avoid unjust results where failure to deliver an insurance policy within the limited interim coverage period is attributable to the insurance company's lack of diligence and not the insured's.

2. The Relationship of the Insurance Broker to the Insurance Company.—It is not uncommon for a person seeking insurance to acquire coverage with a company through an intermediary agent known as a "broker." Because of the variety of coverage available and the prospective insured's relative lack of knowledge of the market, the insurance purchaser may rely largely on the broker's

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[16] *Id.* (quoting district court opinion).

[17] 597 F.2d at 94.

[18] *Id.*

advice as to what coverage to obtain and which company to choose. If the adequacy of coverage is later questioned, the company's liability will often hinge upon whether the broker who procured the policy is deemed to be the agent of the company or the agent of the insured.[19]

In *Prestige Casualty Co. v. Mashburn*,[20] the court was called upon to determine whether an insurance broker was an agent of the company or an agent of the insured. Prior to the acts which were the subject of the lawsuit, the insured, Pearl Mashburn, had been issued an automobile liability policy by Prestige Casualty Company. The coverage for Mashburn's single automobile had been placed with the company by an independent insurance agent through an insurance broker, the Ott and Heying Insurance Agency.[21] At a later date Mashburn purchased a second car and wished to have it added to her existing policy. Unknown to Mashburn, her insurance agent instead requested a *transfer* of coverage. The agent submitted the request for transfer to Ott and Heying and they in turn wrote Prestige to secure the change. Prestige immediately returned the letter to Ott and Heying with an endorsement which signified approval of the transfer. However, before the endorsement was given to Mashburn she had an accident in her first automobile.[22]

When Mashburn made a claim under her policy for defense of a wrongful death action brought against her, Prestige denied coverage on the basis that the automobile was not covered because of the transfer.[23] In denying the insurer's request for a declaratory judgment, the trial court ruled that the negligence of the insurer's agents estopped the insurer from denying coverage.[24] The court of appeals affirmed the trial court holding but found entirely different reasons for doing so.[25]

Initially, the court looked to the terms of the policy to determine the conditions needed to effect a transfer of coverage. The court found that an effective modification required a written endorsement by the company (signifying approval) and issuance of such approval to the insured.[26] The word "issued" in the modification

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[19]For a discussion of the general liabilities of an insurance broker, see Annot., 29 A.L.R.2d 171 (1953).

[20]612 F.2d 1048 (7th Cir. 1980).

[21]*Id.* at 1049.

[22]*Id.*

[23]*Id.*

[24]*Id.* at 1048-49.

[25]*Id.* at 1049.

[26]*Id.* The specific policy language was as follows: "Changes: . . . nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy." *Id.*

clause was determined to be the only unclear word and was accordingly defined as the "act of sending out, or causing to go forth; delivery."[27] Effective issuance was said to require "that the issuance be to the party not making the endorsement, that is, to the insured or the insured's agent."[28]

It was clear from the facts that the endorsement had not been "issued" to Mashburn personally. Therefore, the key issue to be decided was whether Ott and Heying, the broker, was an agent of the insured or an agent of the insurer "for the purpose of receiving delivery of the endorsement."[29]

Prestige urged the court to adopt the ruling of *Automobile Underwriters, Inc. v. Hitch.*[30] In *Hitch* the court had found that the agreement between the intermediate insurance agency and the company specified that the agency was an independent contractor.[31] Also, the agency in *Hitch* was shown to represent several insurance companies and was therefore defined as a "broker."[32] The *Hitch* court stated the general rule that

> [T]he negligence of a broker as opposed to an agent, is not imputed to the insurer. "An insurance broker can be considered an agent only for the purposes of delivering policies and collecting premiums thereon. The insurer would not be bound, ordinarily by the mistakes or negligence of a broker."[33]

The *Mashburn* court, finding the facts to be distinguishable, rejected Prestige's reliance upon *Hitch.* The court placed much weight upon the Agency Agreement between Prestige and Ott and Heying, the major part of which read as follows:

> [T]he Agency can solicit, receipt, and accept applications and proposals for insurance, endorsements, modifications, or other evidences of agreements of insurance; further the Agency can review, assess, and evaluate prospective risks, and where such risks are determined to be in the best interest of Prestige submit applications to Prestige Casualty

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[27] *Id.* (quoting WEBSTER'S NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE. (2d ed. Unabridged, 1948)).

[28] 612 F.2d at 1049 (citing American Family Mut. Ins. Co. v. Bach, 471 S.W.2d 474, 479 (Mo. 1971)).

[29] 612 F.2d at 1049.

[30] 169 Ind. App. 453, 349 N.E.2d 271 (1976).

[31] *Id.* at 460, 349 N.E.2d at 276.

[32] *Id.* (citing 16 J. APPLEMAN, INSURANCE LAW & PRACTICE § 8730 (1968)).

[33] 169 Ind. App. at 460, 349 N.E.2d at 276 (quoting 16 J. APPLEMAN, *supra* note 32, § 8730).

> Company for the purposes of the issuance of an insurance policy.
> [T]he Agency can collect, receive, and receipt for premiums on all policies solicited by the Agency.
>
> [T]he Agency shall comply with Prestige Casualty Company's rules and regulations governing the Agency's operations, and the Agency must strictly comply with all instructions from Prestige, and further the Agency must use those instructions only in the interest of Prestige Casualty Company.
> [T]he Agency has binding authority with Prestige Casualty Company.[34]

The obvious authority to bind Prestige to contracts, the right to collect premiums, and the obligation to act "in the interest of Prestige," were all factors which led the court to conclude that Ott and Heying was the "general agent" of Prestige.[35]

Further, the court noted that the insurer had specified in the contract that delivery of an endorsement would be the "controlling event" necessary to complete a contract modification. Also, the company was responsible for the means chosen to deliver the endorsement.[36] Because Ott and Heying was the general agent of the insurer when the endorsement was received, the endorsement was never "issued" to the insured as specified by the contract. Thus, coverage on the first automobile had not been effectively transferred to the second automobile at the time of the accident.[37]

The result of *Mashburn* is that an insurance agency acting as a "broker" for several companies may be deemed an agent of the insured for one purpose and an agent of a company for another.[38] This rule will render each future case fact-sensitive, with heavy emphasis upon the terms of the agreement between the broker and the company.

3. Automatic Coverage for a Newly Acquired Automobile. — Frequently, a person having automobile insurance replaces a car or

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[34]612 F.2d at 1050.

[35]*Id.*

[36]*Id.*

[37]*Id.*

[38]The court in *Mashburn* made this observation when it distinguishd the rule in *Hitch* (that a broker is the agent of the insured): "It [*Hitch*] decided only that the insurance agency's negligence in failing to obtain sufficient liability insurance for the insured was not attributable, on an agency theory, to the insurer. It did not decide that the insurance agency is not an agent of the insurer for any purpose . . . ." 612 F.2d at 1050.

buys a new one during the term of an existing policy. To avoid a lapse of coverage between the time the vehicle is acquired and notification is given to the company, many standard automobile liability policies contain a provision for temporary automatic coverage.[39] Recently, the Indiana Court of Appeals had its first opportunity to construe a provision providing automatic coverage for a newly acquired automobile.[40]

In *Stockberger v. Meridian Mutual Insurance Co.*,[41] the court was called upon to construe the meaning of "newly acquired" as applied to an insurance policy provision which required that "notice of the acquisition [be] given to the Company within 30 days after [the car's] acquisition . . . ."[42]

The plaintiff in *Stockberger* had purchased a pair of inoperable unlicensed trucks in October of 1973. One was a 1960 one-ton pickup and the other was a 1952 pickup. In February of 1974, the plaintiff renewed coverage with the defendant, Meridian Mutual, for a 1963 pickup truck which he had owned prior to the October of 1973 acquisitions. The renewed coverage was to commence in April of 1974. Sometime during May of 1974, the plaintiff told his insurance agent that his 1960 pickup would soon be operable and that he desired to transfer his coverage from the 1963 pickup to the 1960 pickup. The conversation concerning the transfer took place during an informal gathering of businessmen for morning coffee. From that period on, the facts of the case were in conflict as to what actions were taken by the plaintiff and his insurance agent to accomplish the transfer.[43]

In August of 1974, the 1960 pickup was involved in an accident while being driven by the plaintiff's wife. When the plaintiff made a claim for coverage under his policy, Meridian Mutual denied coverage on the ground that no transfer had occurred and the plaintiff brought an unsuccessful lawsuit against his insurance agent and the company.[44]

The narrowly drawn issue in the action against the company was whether an automobile had to be *operable* when acquired in order to be "newly acquired" for the purpose of giving notice to the company.[45] The court found that there were two distinct lines of

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[39]*See* Stockberger v. Meridian Mut. Ins. Co., 395 N.E.2d 1272, 1276 (Ind. Ct. App. 1979) (quoting 12 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 45:184 (2d ed. 1964)).

[40]Stockberger v. Meridian Mut. Ins. Co., 395 N.E.2d 1272 (Ind. Ct. App. 1979).

[41]*Id.*

[42]*Id.* at 1275 (quoting policy language).

[43]*Id.* at 1274.

[44]*Id.* The plaintiff charged both the company and his insurance agent with breach of contract. In addition, he charged the agent with negligence. *Id. See* notes 58-68 *infra* and accompanying text for the discussion of the agent's liability.

[45]395 N.E.2d at 1276-78. The issue was raised by the plaintiff's claim that the

cases on the subject.[46] The first and "prevailing" line of cases was said to rule "that the test of when an automobile is 'newly acquired' for purposes of giving the requisite notice of acquisition is not when the vehicle is rendered operable but instead when it was acquired."[47] The basic rationale for the rule was that interpretation of an automobile policy as a whole will often indicate that coverage is intended for more than mere highway use.[48] Coverage often extends to such risks as fire, theft and collision, and to liability arising out of maintenance. Thus, coverage could reasonably include an inoperable automobile.[49]

The second line of cases held that the automatic coverage applied only to operable automobiles.[50] Those cases were based on the rationale that "traveling on highways exposes the vehicle's operator to liability, and that the risk for the insurance company is limited to one vehicle at a time, depending upon usage."[51]

In adopting the prevailing line of cases, the court found that the policy in question was intended to cover more than just use on the highway.[52] The policy covered liability arising out of ownership, maintenance, and use; losses for collision, fire and theft; and, losses for collision when the car was parked.[53] Thus, the fact that the plaintiff's pickup was inoperable when acquired, did not affect the duty of notifying the company.[54] On that basis, the plaintiff's alleged notification in May of 1974 was found to be not timely, and his claim was barred.[55]

The ruling in *Stockberger* is logical when one considers that standard automobile insurance is usually more than just liability

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automatic coverage provision was ambiguous. *Id.* at 1277. The court found that it was not. *Id.*

[46]*Id.* at 1276.

[47]*Id.* (citing Reciprocal Exch. v. Noland, 542 F.2d 462 (8th Cir. 1976); Allstate Ins. Co. v. Stevens, 445 F.2d 845 (9th Cir. 1971); Williams v. Standard Accident Ins. Co., 158 Cal. App. 2d 506, 322 P.2d 1026 (1958); Illinois Nat. Ins. Co. v. Trainer, 1 Ill. App. 3d 34, 272 N.E.2d 58 (1971); Brown v. State Farm Mut. Auto. Ins. Co., 306 S.W.2d 836 (Ky. App. 1957); Mahaffey v. State Farm Mut. Auto. Ins. Co., 175 So. 2d 905 (La. App. 1965); Collard v. Globe Indem. Co., 50 So. 2d 838 (La. App. 1951); Providence Wash. Ins. Co. v. Hawkins, 340 S.W.2d 874 (Tex. Civ. App. 1960)).

[48]395 N.E.2d at 1276 (citing Wisbey v. Nationwide Mut. Ins. Co., 264 Or. 600, 507 P.2d 17 (1973)).

[49]395 N.E.2d at 1276.

[50]*Id.* at 1276-77 (citing Luke v. American Family Mut. Ins. Co., 476 F.2d 1015 (8th Cir.), *cert. denied*, 414 U.S. 856 (1973); Glen Falls Ins. Co. v. Gray, 386 F.2d 520 (5th Cir. 1967)).

[51]395 N.E.2d at 1277.

[52]*Id.* at 1278.

[53]*Id.* at 1277-78.

[54]*Id.* at 1278.

[55]*Id.*

coverage. However, most if not all of the cases involving automatic coverage have been ones in which the car owner was seeking insurance coverage for liability to a third party.[56] The contractual notice requirement seems calculated only to give the insurer the opportunity to collect an additional premium when necessary. Is it realistic to require the owner of an inoperable vehicle to give notice, when the notice will require a high premium for liability coverage while his vehicle is inoperable? The immediate answer would be to have the owner give notice but not require him to pay a premium for liability coverage during the inoperable period. This answer, however, does no more than to require the owner to give a second notice when the vehicle becomes operable.

The court in *Stockberger* stated that "an automobile is an automobile."[57] In the contemplation of most car owners, however, it may be more realistic to say that an automobile is only an automobile when it can be used for its designated purpose—to be driven. Surely, few people feel a need for insurance until a car becomes operable and the potential of personal liability arises. So far as *liability* coverage is concerned, a liability insurer is really not on the risk until the car is operable. It would seem more reasonable to require notice for a newly acquired *replacement* vehicle only when actual "replacement" occurs.

4. Liability of an Insurance Agent for Failure to Procure Coverage.—In addition to considering the question of automatic insurance coverage, the court in *Stockberger v. Meridian Mutual Insurance Co.*[58] discussed the liability of an insurance agent for failure to procure coverage. The plaintiff in *Stockberger* claimed that his insurance agent had breached an implied contract to insure plaintiff's truck. Further, the plaintiff claimed that his agent had been negligent in failing to procure coverage once a request had been made.[59]

The factual setting for the issue raised is fairly simple. The plaintiff and his insurance agent discussed the question of insurance for the plaintiff's truck while having coffee one morning with a group of businessmen. The plaintiff claimed that he made a request for a transfer of coverage from one vehicle to another under an existing policy. However, the plaintiff gave his agent no specific information about the truck in question. The agent testified that no request for transfer was made, and that the parties only discussed

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[56]*See* cases cited notes 47 & 50, *supra.*

[57]395 N.E.2d at 1276.

[58]395 N.E.2d 1272 (Ind. Ct. App. 1979).

[59]*Id.* at 1278.

generally the need to insure the vehicle once it was put in use.[60] Although the substance of the conversation was in conflict, it was clear that no further effort was made by either party to consummate the transfer of coverage.

In dealing with the question of implied contract, the court found initially that Indiana law requires agreement on five essential elements in order for a contract of insurance to exist. Those elements were, "(1) the subject of the insurance; (2) the risk or peril insured against; (3) the amount of coverage; (4) the limit and duration of the risk; and (5) the amount of the premium to be paid."[61] On the basis of these five elements the court found that no "meeting of the minds" could have occurred and thus, that no contract could exist.[62]

In arriving at its holding, the court noted that past dealing between the parties could create an implied contract to procure insurance.[63] The evidence showed that the plaintiff had relied to some extent on his agent in the past.[64] However, the court ruled that even though an agent may have authority to perform most of the essential tasks to creating the contract, there was "a corresponding duty on the part of the insured to provide the agent or broker with the information necessary to implement the policy. An agent or broker is not liable when the insured's loss is due to the insured's own act or omission."[65] In this case, the evidence showed that the plaintiff had been aware through past dealing with his agent of his duty to provide information for the policy change.[66] Because no information had been provided, no contract existed.[67] Further, the court determined that the plaintiff had not met his burden of proving the existence of an implied contract arising from an established past practice.[68]

After *Stockberger*, it is apparent that a contract to procure insurance will not be easily established. The intent of the parties to enter into a contract will have to be clearly proven.[69] It is arguable, however, that less proof will be required in a situation where a

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[60]*Id.*

[61]*Id.* at 1279 (citing Farmers Mut. Ins. Co. v. Wolfe, 142 Ind. App. 206, 233 N.E.2d 690 (1968)).

[62]395 N.E.2d at 1279-80.

[63]*Id.* at 1279 (citing Hamacher v. Tumy, 222 Or. 341, 352 P.2d 493 (1960), and citing for comparison Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 55 N.E. 119 (1899)).

[64]395 N.E.2d at 1278-79.

[65]*Id.* at 1279 (citing 3 G. COUCH, *supra* note 39, § 25:60 and Annot., 72 A.L.R.3d 747 (1976)).

[66]395 N.E.2d at 1279.

[67]*Id.* at 1279-80.

[68]*Id.* at 1280.

[69]*Id.*

modification of existing coverage is proposed; the amount of information needed to change a policy may be less than that needed to create a new policy.

B. Misrepresentation

1. Rescission of the Policy. a. Requirement of tender of premiums.—When an insured misrepresents matters in an application for insurance, the insurer may, as a general rule, rescind the policy.[70] The purpose of rescission is to restore the parties to their pre-contract positions.[71] Therefore, to rescind an insurance policy, the insurer must return any premiums paid by the insured.[72] In *American Standard Insurance Co. v. Durham*,[73] however, the Indiana Court of Appeals held that a tender back of premiums paid is not required to rescind a policy if the company has previously paid claims under the policy in excess of the premiums paid by the insured.[74] American Standard issued a policy of automobile insurance to Durham covering a 1973 Corvette. On the application it was stated that Durham had been convicted of bank robbery. Actually, Durham's criminal record was somewhat longer, including convictions for larceny, robbery and leaving the scene of an accident. Durham maintained that he told American Standard's agent about his entire criminal record. Despite this knowledge, the agent had prepared the application form listing only the bank robbery conviction. A single premium of $180 was paid on the policy. A few months later Durham was involved in a one-car accident. American Standard paid a claim of $2300 for the damages. Soon thereafter the car was stolen. The theft was reported to the police and Durham's insurance agent. American Standard investigated the theft but refused to pay anything.[75] Durham sued American Standard for breach of contract seeking compensatory and punitive damages. American Standard set up the affirmative defense of misrepresentation in the application and sought to rescind the policy. A jury awarded Durham $16,900.[76] American Standard appealed, claiming error in a jury instruction to the effect that an insurer must tender premiums paid to rescind a

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[70]*See* Prentiss v. Mutual Ben. Health & Accident Ass'n, 109 F.2d 1 (7th Cir.), *cert. denied*, 310 U.S. 636 (1940); 45 C.J.S. *Insurance* § 470 (1946).

[71]Prudential Ins. Co. v. Smith, 231 Ind. 403, 108 N.E.2d 61 (1952).

[72]Smeekends v. Bertrand, 262 Ind. 50, 311 N.E.2d 431 (1974); Blaising v. Mills, 374 N.E.2d 1166 (Ind. Ct. App. 1978); Berry-Jefferson Corp. v. Gross, 358 N.E.2d 757 (Ind. Ct. App. 1977).

[73]403 N.E.2d 879 (Ind. Ct. App. 1980).

[74]*Id.* at 881.

[75]*Id.* at 880.

[76]*Id.*

policy. It was American Standard's contention that a tender back of premiums was unnecessary because American Standard had already paid a claim which exceeded the amount of premium paid in.[77]

The court of appeals reversed and remanded the case for a new trial.[78] The court recognized an exception in Indiana to the rule requiring prompt tender of premiums; when the insurer has paid a claim which is greater in amount than the premiums, the insurer need not tender the premiums before rescinding the policy.[79] There remains a problem, however, which the court neither dealt with nor apparently recognized. While an insured is bound by *his own* misrepresentations, when an agent, in filling out an application, makes mistakes or misrepresentations, the insured is not bound unless the insured participates in making the misrepresentations.[80] Instead, the insurer is bound by the agent's misrepresentations.[81] In the present case, Durham told the agent about his criminal record, but the agent omitted parts of it on the application. The court apparently accepted the assertion as true, but it did not hold the insurer liable for the agent's mistake. American Standard, not Durham, should be bound by these omissions. The insured should not lose the protection purchased merely because the agent failed to convey what he had been told.

b. When tender is timely.—In *Gary National Bank v. Crown Life Insurance Co.*,[82] the court dealt with another problem concerning when premiums must be tendered. Warren Pike obtained a $50,000 insurance policy on his own life from Crown Life. Gary National Bank was made trust beneficiary of the proceeds. When Pike died five months later, it became apparent that he had made misrepresentations on the application with respect to his medical history. Gary National Bank filed for the death benefits on July 17, 1974. On September 6, 1974 Crown Life refused to pay based on the misrepresentations, and sent a check for the premiums to Gary National Bank. The bank, while still in possession of the check, filed suit on January 28, 1975. The check was returned to Crown Life on June 17, 1975. On May 25, 1976, less than a month before trial, Crown Life tendered a check for the premiums into court.[83] The trial court held for Crown Life.[84] On appeal, the only issue decided was whether

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[77]*Id.* at 880-81.

[78]*Id.* at 882.

[79]*Id.* at 881. *See* Great E. Cas. Co. v. Collins, 73 Ind. App. 207, 126 N.E. 86 (1920).

[80]17 J. APPLEMAN, *supra* note 32, § 9409; G. COUCH, *supra* note 39, § 26:170.

[81]17 J. APPLEMAN, *supra* note 32, § 9409; G. COUCH, *supra* note 39, § 26:170.

[82]392 N.E.2d 1180 (Ind. Ct. App. 1979).

[83]*Id.* at 1180-81.

[84]*Id.* at 1181.

Crown Life's tender of the premiums into court was timely.[85]

The court of appeals found that the tender was timely and affirmed.[86] When the beneficiary refuses a tender of premiums, the insurer must pay the money into court or the fraud upon which the rescission is based is waived.[87] When the check was returned to Crown Life on June 17, 1975, Crown Life had a duty to tender the premiums into court. The purpose of paying the money into court is to determine who is entitled to it.[88] By the time Crown Life finally paid the premiums into the court, neither party claimed any right to it. The court noted that both parties could have been more diligent in tendering the premium check, but as long as the court was in possession of the funds before a trial on the merits, Crown Life's tender was timely.[89] In *Prudential Insurance Co. of America v. Smith*,[90] a case factually similar to the present case, the Indiana Supreme Court held that failure of the insurance company to tender premiums into court after the beneficiary had refused them constituted a waiver of a fraud defense on the policy.[91] In that case the insurer never paid the premiums into court, whereas Crown Life tendered the premium just prior to trial. The court did not decide exactly when a tender of premiums to a beneficiary would have to be made to be timely. The decision does indicate, however, that once a beneficiary refuses the tender of premiums, an insurance company can wait until just prior to trial to pay the premiums into court. Not only does the insurance company not have to pay any proceeds on the policy, but it has use of the premiums until trial.

c. Duty of insurer to investigate application.—The extent to which an insurer must make inquiry into representations on an application was decided in *State Farm Mutual Automobile Insurance Co. v. Price*.[92] On the application for an automobile liability insurance policy John Price answered "no" to the question whether the applicant or any member of his household had been convicted of or forfeited bail for any traffic violation. Price's son, John Ray Price, however, had been convicted of three traffic offenses.[93] State Farm did not investigate the driving records of Price or his family but relied on the answers on the application. John Ray was involved in an accident while driving an insured automobile. State Farm

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[85]*Id.*

[86]*Id.* at 1182.

[87]Prudential Ins. Co. v. Smith, 231 Ind. 403, 108 N.E.2d 61 (1952).

[88]392 N.E.2d at 1182.

[89]*Id.*

[90]231 Ind. 403, 108 N.E.2d 61 (1952).

[91]*Id.* at 413-14, 108 N.E.2d at 65.

[92]396 N.E.2d 134 (Ind. Ct. App. 1979).

[93]*Id.* at 135-36.

discovered the misrepresentations in the application and filed an action to rescind the policy.[94]

The trial court found that Price had materially misrepresented the driving records of Price and his son and that State Farm had relied on these statements. Although State Farm was not put on notice of any misrepresentations, the trial court determined that State Farm had a duty to investigate an applicant's insurability within a short time after issuance of the policy; State Farm had failed to conduct an investigation and therefore had waived its right to rescind the policy.[95]

The court of appeals reversed the trial court's decision.[96] The court noted that, as a general rule, an insurance company may rely on matters asserted in a policy application.[97] When an insurance company is placed on "inquiry notice" it has a duty to investigate and failure to do so waives the company's right to rescind the policy. Such notice arises when the company or its agent has knowledge that would lead a prudent man to inquire about the matter;[98] but when the company has no reason to doubt a statement in an application, it may rely on that statement without inquiry.[99] The trial court found State Farm had no notice of the misrepresentations of John Ray Price's driving record; therefore no duty to investigate arose, and State Farm was not precluded from rescinding the policy.[100]

2. Misrepresentation by the Insurer's Agent.—In *AAA Wrecking Co. v. Barton, Curle & McLaren, Inc.*,[101] the court of appeals held that where "a party with knowledge of the facts, makes a representation of a material fact with the knowledge . . . that another party will rely upon it, and where the representation does induce reliance by the other party, the party making such representation will be estopped from denying its truth . . . ."[102] AAA Wrecking entered a contract to destroy a building in downtown Indianapolis owned by Thomas. Thomas requested that AAA carry collapse insurance. Thomas agreed to adjust the contract price upwards to reflect the cost of this insurance. It was also agreed that the cost of this extra insurance would be worked out between the insurance agent, Bar-

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[94]*Id.* at 136.
[95]*Id.*
[96]*Id.* at 137.
[97]*Id.*
[98]*Id.*
[99]*Id.*
[100]*Id.*
[101]395 N.E.2d 343 (Ind. Ct. App. 1979).
[102]*Id.* at 346-47.

ton, Curle and McLaren (BC & M), and Thomas.[103] An agreement was reached and BC & M did provide the extra coverage. BC & M requested that AAA pay $4,198 as the premium for the additional coverage. AAA maintained, however, that the figure given to Thomas was only $1,871 and that since this was the figure by which the contract price was adjusted, AAA had relied to its detriment on the representation of BC & M. Therefore, AAA argued that BC & M was estopped to recover the excess premium.[104]

The trial court held that AAA had not carried its burden of proof on the issue of whether the lesser figure was supplied in such a way as to amount to an equitable estoppel. The court of appeals, however, reversed the trial court's decision as contrary to the evidence.[105] Testimony indicated that BC & M had quoted the $1,871 figure to Thomas and that this figure had been incorporated into the contract. BC & M did not contradict this testimony. The court of appeals found that BC & M knew or should have known that AAA would rely on the figure to its detriment.[106] Therefore BC & M was estopped to recover any more than $1,871 as premium for providing the requested coverage.[107]

C. Uninsured Motorist Coverage

1. Stacking of Benefits.—Recently, the court of appeals addressed the subject of intra-policy stacking of benefits under uninsured motorist coverage in Indiana. *Liddy v. Companion Insurance Co.*[108] and *Indiana Insurance Co. v. Ivers*[109] dealt with very similar fact settings and virtually identical issues.[110] *Ivers*, the most recent of the two cases, will be the focus of discussion in this section.

In *Ivers*, the plaintiffs' decedents were killed when the automobile in which they were riding collided with a vehicle driven by an uninsured motorist.[111] At the time of the collision there was an insurance policy in effect through the defendant, Indiana Insurance Company, which extended to the plaintiffs' decedents.[112] The policy

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[103]*Id.* at 344.

[104]*Id.*

[105]*Id.* at 347.

[106]*Id.* at 346.

[107]*Id.*

[108]390 N.E.2d 1022 (Ind. Ct. App. 1979).

[109]395 N.E.2d 820 (Ind. Ct. App. 1979).

[110]Besides the question of stacking, *Liddy* also dealt with the issue of what constitutes a proper subject of arbitration. *See* text accompanying notes 219-24 *supra.*

[111]395 N.E.2d at 821. The negligence of the uninsured driver was stipulated to be the proximate cause of the accident. *Id.*

[112]The plaintiffs were the administrators of the decedents' estates. One plaintiff,

in question covered three automobiles and required individual premiums for each automobile. A separate premium for uninsured motorist coverage was also required on each automobile. The limits of liability stated for uninsured motorist coverage were $15,000 for each person and $30,000 for two or more persons for injuries arising out of one accident.[113]

The plaintiff's claim for wrongful death against the company was $90,000. This amount represented the combined maximum uninsured motorist coverage for each of the three automobiles. The plaintiffs reasoned that they should be able to "stack" the maximum benefits of $30,000 for each automobile because the policy listed each automobile separately and because a separate uninsured motorist premium was assigned and collected for each vehicle.[114] The crux of the plaintiffs' position was that the "limits of liability" provision[115] of the policy conflicted with the "separability clause" of the policy,[116] thereby creating an ambiguity which the plaintiffs argued had to be construed against the company and in favor of extended coverage.[117] The plaintiffs also asserted that the company's collection of a separate uninsured motorist premium for each automobile raised an implication that a separate contract existed for each automobile.[118]

The precedent for the plaintiffs' ambiguity argument came from the 1974 Indiana Court of Appeals decision in *Jeffries v. Stewart*.[119] In *Jeffries*, the court had compared a limits of liability clause and a separability clause much like the ones facing the *Ivers* court. In ad-

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Bobby W. Ivers, was the owner of the vehicle involved in the accident and the named insured on the automobile insurance policy. *Id.*

[113]*Id.* at 822. The limits of liability were identical to the minimum amounts required by IND. CODE §§ 27-7-5-1, 9-2-1-15 (1976). 395 N.E.2d at 822.

[114]395 N.E.2d at 822.

[115]The "Limits of Liability" provision read as follows:

> The limit of liability for family protection coverage [uninsured motorist coverage] stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injuries sustained by one person as a result of any one accident and, subject to the above provision respecting each person, the limit of liability stated in the declarations as applicable to "each accident" is the total limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injuries sustained by two or more persons as a result of any one accident.

Id.

[116]The "separability clause" stated: "4. Two or more automobiles—Parts I, II, and III. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each . . . ." *Id.*

[117]*Id.* at 823.

[118]*Id.* at 822.

[119]159 Ind. App. 701, 309 N.E.2d 448 (1974).

dressing the issue of ambiguity, the court in *Jeffries* had stated:

> Ambiguity arises because of conflict between the "two or more automobiles" clause and the "limits of liability" clause. The "two or more automobiles" clause, or separability clause as it is also known, effectuates a contract of insurance separately as to each car insured, and binds each policy with all of the provisions and conditions of the single policy. Each of the three policies then contains a promise to pay the insured damages . . . .[120]

The *Jeffries* court then found that the separability clause expressly applied to the uninsured motorist provision and held that a separate contract of insurance existed for each of the three automobiles.[121] Stacking of benefits was therefore allowed.[122]

The *Ivers* court found *Jeffries* to be distinguishable because the separability clause in the Indiana Insurance Co. policy did not apply to the uninsured motorist provision.[123] Thus, no ambiguity was found to exist and the court refused to allow stacking of benefits.[124]

To fully dispose of the question of stacking, the *Ivers* court lastly addressed the plaintiffs' argument that the separate uninsured motorist premiums charged obligated the insurer to provide multiple coverage.[125] The court rejected the argument, stating, "We find that the insurer gave consideration in the form of accepting increased risk for the extra premium charged per automobile; therefore, we do not find that the separate premiums require 'stacking.'"[126] This holding was based on the premise that the company would have more than one risk of loss if all the insured vehicles were on the highway at one time.[127]

After *Ivers*, it is probable that the issue of stacking may not be raised again in Indiana. As one author remarked following *Jeffries*, the ambiguity issue raised in stacking cases can be avoided by "proper

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[120] *Id.* at 707, 309 N.E.2d at 452.

[121] *Id.*

[122] *Id.* at 709, 309 N.E.2d at 453.

[123] 395 N.E.2d at 823.

[124] *Id.* The *Ivers* court found its ruling to be consistent with other Indiana cases having similar facts. *Id.* (citing Trinity Universal Ins. Co. v. Capps, 506 F.2d 16 (7th Cir. 1974) (wherein the separability clause did not include uninsured motorist coverage); Miller v. Hartford Accident & Indem. Co., 506 F.2d 11 (7th Cir. 1974) (wherein the insurance policy contained no separability clause); & Liddy v. Companion Ins. Co., 390 N.E.2d 1022 (Ind. Ct. App. 1979) (wherein the separability clause exempted uninsured motorist coverage)).

[125] 395 N.E.2d at 823-24.

[126] *Id.* at 824.

[127] *Id.* The holding was found to be consistent with numerous other authorities. *See* cases cited, *id.* at 824-25.

draftsmanship."[128] The contract language in Indiana stacking cases since *Jeffries*[129] has avoided any problematic ambiguity, leading to the suggestion that insurance contract drafters may have taken heed of the *Jeffries* lesson.

2. The Effect Upon Uninsured Motorist Coverage of Prior Settlement with Tortfeasor.—In *Spears v. Jackson*[130] the court of appeals upheld an insurance policy provision which voided uninsured motorist coverage if the insured entered into settlement with a tortfeasor without the consent of the company.[131]

The plaintiff in *Spears* was injured in a three car collision. Of the two tortfeasors, one was insured and the other was not. Without the permission of the insurance company, Spears settled with the insured tortfeasor. Spears' subsequent claim for uninsured motorist coverage was denied for violation of the aforementioned provision.[132]

In upholding the validity of the provision, the court found that the consent-to-settle requirement did not contravene public policy as an improper restriction on a person's right to redress injuries in a court of law.[133] Further, the court rejected the plaintiff's argument "that the provision was intended to void coverage *only* in the context of settlements with uninsured motorists."[134] The policy language was found to be clear and unambiguous; the court therefore refused to strictly construe the contract against the insurer.[135]

The most important aspect of *Spears* was the court's express rejection of the Michigan rule of insurance policy construction which always gives "a construction which is most favorable to the insured."[136] The court stated that Indiana law allows such a construction only where the policy language is ambiguous.[137] Otherwise,

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[128]Frandsen, *Insurance, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 217, 224 (1974).

[129]*See* cases cited note 124 *supra*.

[130]398 N.E.2d 718 (Ind. Ct. App. 1980).

[131]The relevant provision in the Prestige Casualty policy was as follows:

> This [uninsured motorist] endorsement does not apply:
>
> a) to bodily injury to an insured with respect to which such insured, his legal representative or any person entitled to payment under this endorsement shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor.

Id. at 719.

[132]*Id.*

[133]*Id.*

[134]*Id.*

[135]*Id.* at 720.

[136]*Id.* at 719 (rejecting Michigan Mut. Liab. Co. v. Karsten, 13 Mich. App. 46, 163 N.W.2d 670 (1968)).

[137]398 N.E.2d at 719.

"[w]here the policy language is clear and unambiguous, it must be taken in its plain, ordinary and popular sense."[138]

D. Subrogation—Builder's Risk Insurance

During the previous survey period, the decision in *Morsches Lumber, Inc. v. Probst*[139] introduced into the law of Indiana the concept that "an agreement to provide insurance constitutes an agreement to limit the recourse of the party acquiring the policy solely to its proceeds even though the loss may be caused by the negligence of the other party to the agreement."[140] In the recent survey period the rule of *Morsches* was firmly entrenched in Indiana in *South Tippecanoe School Building Corp. v. Shambaugh & Son, Inc.*[141] While *Morsches* dealt only with a simple owner-contractor construction relationship, *Shambaugh* involved a complex construction contract with an owner, a general contractor, and several subcontractors.

The lawsuit in *Shambaugh* was a subrogation action brought by the builder's risk insurer, Hartford Insurance Company, in the name of the property owner, South Tippecanoe. Hartford had paid South Tippecanoe for property damage to a high school building under construction which allegedly resulted from negligence by the contractor, subcontractors, and architects on the project. The various defendants were awarded a summary judgment in the trial court on the basis that the existing contracts foreclosed an action for the injuries alleged.[142]

In order to ascertain the intent of the parties to the construction contracts the court laid out the relevant provisions of the general contract (Contract for Construction) and the relevant provisions of the builder's risk insurance policy. The paragraph of the general contract entitled *Property Insurance* set forth three obligations with respect to the procurement of builder's risk insurance. First, the owner was required to maintain insurance on the entire project which would protect and include the interest of all the parties for fire and other property damage hazards.[143] Second, proceeds

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[138]*Id.* (citing Vernon Fire & Cas. Ins. Co. v. American Underwriters' Inc., 356 N.E.2d 693 (Ind. Ct. App. 1976)).

[139]388 N.E.2d 284 (Ind. Ct. App. 1979).

[140]*Id.* at 285. For a general discussion of *Morsches, see* Mortensen, *Insurance, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 279, 289-91 (1980).

[141]395 N.E.2d 320 (Ind. Ct. App. 1979).

[142]*Id.* at 322.

[143]*Id.* at 323. The provision stated:

> 11.3.1 Unless otherwise provided, the Owner shall purchase and maintain property insurance upon the entire Work at the site to the full insurable value thereof. This insurance shall include the interest of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work and shall in-

payable for any loss were to be paid to the owner as "trustee" for all insureds.[144] Third, the owner and general contractor were to "waive all rights against each other" for insured perils and the contractor was required to procure similar waivers from all subcontractors.[145]

The key provision of the insurance policy was the subrogation clause which allowed the company to be subrogated to the insured's rights. However, the clause permitted the insured to waive its rights against subcontractors and other entities performing work without invalidating the insurance coverage.[146]

On the basis of the foregoing contractual limitation the court found that the contract "evinces an intent to place any risk of loss on the Work on insurance; the Defendants are intended 'insured' under the builder's risk policy; and, the waiver provisions are fully applicable here."[147] The court went on to conclude that "a builder's risk insurer is not entitled to subrogate against one whose interests are insured even though the party's negligence may have occasioned the loss, in the absence of design or fraud."[148]

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sure against the peril of Fire, Extended Coverage, Vandalism and Malicious Mischief. [Subparagraph]

Id. (footnotes omitted).

[144]*Id.* The provision stated: "11.3.3 Any insured loss is to be adjusted with the Owner and made payable to the Owner as trustee for the insureds, as their interests may appear, . . . [Subparagraph]." *Id.*

[145]*Id.* The provision stated:

> 11.3.6 The Owner and Contractor waive all rights against each other for damages caused by fire or other perils to the extent covered by insurance provided under this Paragraph 11.3, except such rights as they may have to the proceeds of such insurance held by the Owner as trustee. The Contractor shall require similar waivers by Subcontractors and Sub-subcontractors in accordance with Clause 5.3.1.5. In waiving rights of recovery under terms of this paragraph, the term "Owner" shall be deemed to include his employees and the Architect and his employees as the Owner's representative as provided for in the Contract Document. [Subparagraph]

Id.

[146]*Id.* at 324. The clause stated:

> In the event of any payment under this policy, the Company shall be subrogated to all of the Insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights.
>
> This insurance, however, shall not be invalidated should the Insured waive in writing prior to a loss to the described property any or all right of recovery against any entity for whom work is being performed, or against any subcontractor working on the job insured hereunder.

Id.

[147]*Id.* at 326.

[148]*Id.* at 328.

The *Shambaugh* case is a well written and soundly reasoned opinion. The rule will aid in solving the problem of apportioning risks in the context of construction contracts and should help to reduce litigation arising out of construction loss disputes.

E. Insurer's Duty to Settle

One of the realities to be faced by a plaintiff in modern tort litigation is that defense of a lawsuit is likely to be managed, negotiated, and tried or settled by the defendant's liability insurer.[149] As a result, a plaintiff who has been met with less than good faith bargaining on the part of a defendant's insurance company may justifiably desire to see the insurer taken to task. During the survey period the Indiana Court of Appeals made a definite statement with respect to the insurer's duty to use good faith in negotiating with a tort claimant on behalf of its insured tortfeasor.

In *Winchell v. Aetna Life & Casualty Insurance Co.*,[150] the plaintiff brought a lawsuit against the University of Evansville for alleged injuries to her minor son. While her first lawsuit was pending, the plaintiff initiated a second lawsuit against the University's liability insurer, Aetna Life and Casualty, wherein she sought damages for economic and emotional injuries allegedly caused by the insurer's failure to settle in good faith.[151] A key fact relied on by the plaintiff in her second action was that she was also insured by Aetna through coverage provided by her employer.[152] This fact, she alleged, created a fiduciary duty on the part of the insurance company toward her, and made the company liable for its unwillingness to accept her settlement offers.[153] The trial court granted the insurance company's motion to dismiss for failure to state a claim upon which relief could be granted.[154]

In addressing the issue of the insurer's duty to "make a reasonable effort to compromise the plaintiff's claim against the defendant-insured,"[155] the court of appeals relied principally upon the 1972 Indiana case of *Bennett v. Slater*.[156] In *Bennett*, the tort claimant had recovered a judgment in excess of policy limits against the

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[149]*See* Annot., 50 A.L.R.2d 458 (1956); Annot., 49 A.L.R.2d 694 (1956); Annot., 41 A.L.R.2d 434 (1955).

[150]394 N.E.2d 1114 (Ind. Ct. App. 1979).

[151]*Id.* at 1115.

[152]*Id.*

[153]*Id.* The plaintiff also sought punitive damages for alleged willful and intentional acts by the insurer to deprive her of her rights. *Id.*

[154]*Id.*

[155]*Id.* at 1116.

[156]154 Ind. App. 67, 289 N.E.2d 144 (1972).

defendant-insured. Prior to trial, Bennett had offered to settle for the policy limits but Slater's insurer had declined. When Slater, the insured-judgment debtor, refused to bring his own action against his insurer, Bennett sued the company directly to recover his excess judgment. The dismissal of Bennett's direct action was upheld because the court of appeals found that the company had no duty to Bennett to accept Bennett's settlement offer.[157] The *Bennett* court had concluded that "[t]he duty of an insurance company to protect its insured against liability cannot consistently be extended to include protection to one who is seeking to hold the insured liable."[158]

In applying the *Bennett* rule, the *Winchell* court noted that its own factual setting was distinguishable.[159] However, the court found the *Bennett* rule to be particularly significant because the appellant was suing the insurer *prior* to termination of her suit against the insured: "If a party with a claim against the insured cannot maintain an action against the insurer even when the insured refuses to sue, then surely the claimant cannot maintain such an action before the insured indicates that it will not sue its insurer."[160]

The court made short shrift of the appellants' fiduciary duty argument. There were no matters pleaded from which the court could find reason to make a connection between Winchell's own insurance contract with Aetna and her claim for negligence against the University.[161] The court concluded:

> Common sense indicates that such a leap in reasoning is imprudent. It stretches the concept of a fiduciary relationship too far to say that a fiduciary relationship established between an insurance company and its insured extends to a lawsuit by that insured against another person insured by the same insurance company.[162]

Thus, it is clear in Indiana that an insurance company has no duty to use good faith in negotiating with a tort claimant on behalf of an insured defendant. Moreover, no special fiduciary duty arises on the part of the company where it turns out that the claimant and the tortfeasor are both insured by the same carrier.

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[157] *Id.* at 73-74, 289 N.E.2d at 148 (quoting Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1176 (1954)).

[158] 154 Ind. App. at 73, 289 N.E.2d at 148 (quoting Seguros Tepeyac, S.A., Compania Mexicana v. Bostrom, 347 F.2d 168 (5th Cir. 1965)).

[159] 394 N.E.2d at 1117.

[160] *Id.* The court further commented that Winchell's premature lawsuit "could have the effect of determining the insured's liability prior to its own trial, because the question of the insurer's good faith regarding settlement may be related to the relative strength of the plaintiff's case against the insured." *Id.*

[161] *Id.* at 1117-18.

[162] *Id.* at 1118.

The question which remains after *Winchell* and its reliance upon *Bennett*, is who will be responsible for holding the insurance company accountable for occasional misconduct in defending lawsuits. The obvious person would seem to be the insured. In *Bennett v. Slater*,[163] however, the insurance company exposed its insured to an excess judgment, forced the plaintiff into litigation, and then escaped unscathed when the insured refused to exercise his own chose in action for bad faith.[164] The question of insurance company accountability is one that should not be overlooked when the courts have occasion to rule in the future on the issue of the insurer's duty to use good faith in settling lawsuits.

F. Waiver and Estoppel

Forfeitures of insurance proceeds are not favored in Indiana law. Nevertheless, failure to pay a premium may result in a forfeiture unless waived by the insurer or unless the insurer does something which causes the insured to fail to pay a premium on time. Failure to timely pay a premium was the subject of two cases decided during the survey period.

In *Hargis v. United Farm Bureau Mutual Insurance Co.*,[165] Farm Bureau had issued a general liability policy to the Hargises to cover a recreational facility which they operated. The policy was to run for a year beginning June 25. An estimated premium was paid in advance and was then adjusted at the end of the year to the actual amount of the premium which depended on the number of people using the recreational facility. If any premium was unearned, it was to be returned to the insured. On May 14, 1974, a combination billing statement/cancellation notice was sent to the Hargises. The amount

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[163]154 Ind. App. 67, 289 N.E.2d 144 (1972).

[164]*Id.* Numerous problems arise in relying upon the insured to hold the insurer accountable. In practice, the insured may have no idea of the wrong which has been done to him by the insurer's bad faith refusal to settle. *See, e.g.*, Simpson v. Motorists Mut. Ins. Co., 494 F.2d 850 (7th Cir.), *cert. denied*, 419 U.S. 901 (1974) (wherein the insurance company negotiated with the claimant and rejected his settlement offers without notifying the insured); Jones v. National Emblem Ins. Co., 436 F. Supp. 1119 (E.D. Mich. 1977) (wherein the insurer conducted negotiation and settlement while misrepresenting to its insureds the chances of successful defense and potential exposure); Rutter v. King, 57 Mich. App. 152, 226 N.W.2d 79 (1974) (wherein the attorney for the insurance company (who had represented the insured in the personal injury action) helped the insured to file his bankruptcy papers in order to discharge an excess judgment). The reality is that though the insured may be the one positioned to hold the insurer accountable, such alternatives as bankruptcy or flight (as in the *Bennett* case) may appear preferable to hiring a new attorney and bearing the cost of further litigation while one's credit is impaired and one's property is subject to execution.

[165]388 N.E.2d 1175 (Ind. Ct. App. 1979).

due was $221, and if it was not paid by July 8, 1974, the policy was to be cancelled. Normally a copy of this statement was also sent to the local agent; in this case, however, none was sent. The Hargises did not pay the premium although they acknowledged that they had received the notice.[166]

On July 26, 1974, a minor, Ronald Gibbs, was injured on the premises of the recreational facility. The Hargises notified the local agent of Farm Bureau and an investigation and processing of the claim commenced. Farm Bureau paid Patricia Koch, Gibbs' mother, for some of Gibbs' medical bills. Koch was also told to buy some medical equipment in expectation of reimbursement.[167] It is unclear who told Koch to purchase the equipment, but it can be inferred that it was either the local agent or the adjuster. Neither the agent nor the adjuster was informed that the last premium had not been paid.[168] The regional adjuster discovered the failure to pay the premium in January of 1975, at which time a letter was sent to the Hargises which stated that the company had not waived the premium requirement.[169] Gibbs and Koch filed suit in tort against the Hargises and subsequently, Farm Bureau brought this action against the Hargises, Gibbs, and Koch for a declaratory judgment that it had no obligation to defend the Hargises.[170]

The trial court found that no insurance policy was in force on the date of the accident and that there was no waiver or estoppel by Farm Bureau that would give effect to the policy.[171] The Hargises, Gibbs, and Koch appealed.

Four issues were raised on appeal:[172] (1) Did the trial court abuse its discretion in denying a motion by Gibbs and Koch for leave to amend their answer to include the affirmative defenses of estoppel and waiver? (2) Was Farm Bureau estopped to assert the unpaid premium by virtue of the actions of itself and its agents? (3) Did Farm Bureau impliedly waive the payment of the premium as a condition to recover on the policy? and (4) Should the past unused premiums apply toward the premium due for the term in question?[173]

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[166]*Id.* at 1177.

[167]*Id.* at 1177-78.

[168]*Id.*

[169]*Id.* at 1178.

[170]*Id.*

[171]*Id.*

[172]The court said three issues were raised on appeal, but it dealt with estoppel and waiver as if they were a single issue. *Id.* at 1179.

[173]*Id.* at 1178-80. There was no evidence presented in regard to the existence or amount of any unused premiums. The court of appeals refused to consider this fourth issue. *Id.* at 1180.

The court found no abuse of discretion as to the first issue.[174] Leave to amend is a matter of discretion with the trial court. The trial court had permitted the Hargises to amend their answer to include estoppel and waiver as affirmative defenses.[175] Gibbs and Koch were not permitted to amend because the action was for declaratory judgment on a contract to which they were not parties. Any recovery inuring to Gibbs and Koch would depend on the existence of a contractual relation between Hargis and Farm Bureau.[176]

Because Gibbs and Koch were not permitted to amend, resolution of the other three issues did not apply directly to them but to the Hargises. Resolution of issues (2) and (3) gave the court an opportunity to explain the difference between estoppel and waiver.[177] Waiver is distinguised from estoppel in that waiver includes an intent to surrender a known right while intent is immaterial for estoppel. An implied waiver may be shown when a party by his actions indicates an intention to waive his rights inducing the other party to act upon the belief that there has been a waiver. Estoppel requires a deception by which the other party is induced to rely on the acts or statements to his detriment.[178] Obviously, the distinction between implied waiver and estoppel is difficult to discern.

The court found that estoppel did not apply because there had been no detrimental reliance.[179] The Hargises did not change their position or give up any defense because of the acts of the company's agents.[180] The Hargises claimed an estoppel based upon the insurer's payment of medical bills and its promise to reimburse Mrs. Koch for her purchase of medical equipment. A further estoppel was claimed because the policy had been treated as in force for six months. The court reasoned that the Hargises could not be "lulled by a false sense of security to not acquire insurance elsewhere to cover an accident which had already occurred."[181]

There are two possible problems with this reasoning: First, while the Hargises did nothing after the accident, Koch did rely on the acts of the agents of Farm Bureau in telling her to purchase medical equipment. To the extent that the Hargises would be relieved

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[174]*Id.* at 1178.

[175]*Id.*

[176]"[P]arties who are strangers to the contract and not named therein as the insured have been held not entitled to claim waiver or estoppel against the company so as to extend the coverage of the policy to include their interest in the insured property." 45 C.J.S. *Insurance* § 677, at 622 (1946).

[177]388 N.E.2d at 1178-79.

[178]BLACK'S LAW DICTIONARY 1417 (5th ed. 1979).

[179]388 N.E.2d at 1178.

[180]*Id.* at 1179.

[181]*Id.*

of liability for this cost by Farm Bureau's promise to pay, their position was changed in reliance on the acts of Farm Bureau's agents. Second, while the Hargises would not have purchased insurance from another insurer after the accident, they might have done so had they been informed of the cancellation prior to the accident. Ordinarily, an insurance policy cannot be cancelled without notice to the insured.[182] It is unclear whether the billing statement was sufficient notice to cancel. If the premium was not paid because the statement was lost or mislaid or because of oversight, obviously the notice of cancellation would be lost, mislaid or overlooked, too. In addition, no notice was sent to the insured's local agent, which might have been construed as additional notice to the insured.

The Hargises also argued that the premium requirement was impliedly waived by the acts of the agents in treating the policy as in effect for six months after the accident.[183] The court refused to impute the knowledge of cancellation by the home office to the local agent.[184] Because the intent to waive rights is necessary for a waiver, an agent who was not aware of failure to pay a premium could not intend to waive the failure as a condition of recovery. The court gave four reasons for this: (1) Failure to pay the premium and the cancellation notice were never discussed by the agent and the Hargises; (2) the Hargises never paid the premium and nothing was discussed as to using previous excess premium towards the premium due; (3) "most, if not all, insureds know that if they fail to pay the premiums they are no longer insured;"[185] and (4) the Hargises were not injured by the length of the period during which the policy was treated as in force.[186]

There are numerous problems with this reasoning. First, there are strong policy reasons for imputing the knowledge of the home office to the agent. Farm Bureau knew that no premium had been received and that it had cancelled the policy on July 8, 1974. It would seem that Farm Bureau should have a duty to inform its agents and adjusters that the policy had been cancelled within a reasonable time rather than let them treat the policy as in force for six months. Because the agents were not notified, Farm Bureau should be bound by the representations of the agents. Second, it

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[182]Hoosier Ins. Co. v. Ogle, 150 Ind. App. 590, 276 N.E.2d 876 (1971); LaSalle Cas. Ins. Co. v. American Underwriters, Inc., 148 Ind. App. 675, 269 N.E.2d 563 (1971); Allstate Ins. Co. v. Morrison, 146 Ind. App. 497, 256 N.E.2d 918 (1970); United Farm Bureau Mut. Ins. Co. v. Adams, 145 Ind. App. 516, 251 N.E.2d 696 (1969).

[183]388 N.E.2d at 1179.

[184]*Id.*

[185]*Id.*

[186]*Id.*

makes no difference that the agent and the Hargises never discussed the premium, because implied waiver, by definition, is usually discerned from actions rather than express statements.[187] Third, even if the agent had no authority to bind Farm Bureau, the adjuster did. An adjuster is regarded as the representative of the company.[188] "[A]cts performed by him within the usual scope of business entrusted to him are binding on the company in the absence of notice of any limitations to the insured or fraud."[189] There is authority to support an implied waiver when the adjuster treats the policy as valid and effective, even when there is a defense known to the insurer.[190]

Finally, the facts do not indicate whether the Hargises were injured by the delay before refusal to honor the policy. Presumably, they were operating without insurance during this period and could have been liable for other accidents. It is also unclear whether they changed their position in any way as a result of the belief that they were covered for the accident.

Brand v. Monumental Life Insurance Co.[191] raises the issue of whether there is a forfeiture of the proceeds of a life insurance policy for failure to pay a premium within a 31-day grace period when the established company policy was to accept payments within sixty days after the grace period.[192] An agent of Monumental visited Bruce and Dorothy Brand at their home on July 9, 1975 for the purpose of collecting an overdue premium on a $10,000 insurance policy on the life of Bruce Brand. Bruce died five days later without having paid the premium. Dorothy tendered the overdue premium on July 22, 1975, but the tender was refused by Monumental's agents. Monumental admitted that it normally accepted premiums for sixty days after the end of the grace period provided that the insured was alive and in apparent good health and that Monumental would have accepted the premium had Bruce Brand been alive and apparently well.[193] From a trial court decision for Monumental, Brand appealed.[194] In reversing the trial court,[195] the court of appeals af-

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[187]*See* note 142, *supra.*

[188]16A J. APPLEMAN, *supra* note 32, § 9369.

[189]*Id.*

[190]*See* Travelers Ins. Co. v. Eviston, 110 Ind. App. 143, 37 N.E.2d 310 (1941) (a general agent of insurance company, in the absence of the insured's knowledge of limitation on his authority, has authority to bind the company by his acts to the extent of modifying terms and conditions of the policy); Penn Mut. Life Ins. Co. v. Senhenn, 40 Ind. App. 85, 81 N.E. 87 (1907) (payment of premium may be waived).

[191]396 N.E.2d 417 (Ind. Ct. App. 1979).

[192]*Id.* at 419.

[193]*Id.*

[194]*Id.* at 418.

[195]*Id.* at 422.

firmed its long-standing rule in *Odd Fellows' Mutual Aid Association v. Sweetser*[196] that the insurance company will be estopped to insist on a forfeiture when, by an agreement, the insured is led to believe that the premiums will be accepted after the date specified as the end of the period.[197] This agreement does not have to be express; it can be implied from statements or established by a mere course of conduct.[198] Monumental's practice was to accept the premium only if the insured was alive and seemed to be in good health. Such a practice conditions liability on having no risk during the extension period. This was prohibited in *Michigan Mutual Life Insurance Co. v. Custer*,[199] because it "enable[s] the company, under a show of leniency, to receive all the benefits of the extension, and yet remain in a condition to repudiate all liability during the same time."[200] Recovery for a loss occurring before payment should not be disallowed when the company has extended the time for payment beyond the date of loss. Indiana agrees with the majority of jurisdictions in this rule,[201] which is consistent with the general disfavor which forfeitures face.[202]

G. Arbitration

Arbitration is a means of dispute settlement common to insurance contracts. While arbitration clauses are usually enforced if applicable, the court of appeals found on two recent occasions that an arbitration was not applicable to the situation before it.

During the survey period, the court of appeals decided an arbitration clause case which it considered to be one of first impression. In *McNall v. Farmers Insurance Group*[203] David McNall was severely injured when the motorcycle on which he was riding was struck by a motorcycle driven by Rick Waterson. Waterson was uninsured and did not have an operator's license. David's father, Ralph McNall, held three policies of insurance issued by Farmers Insurance Group, all of which contained uninsured motorist coverage. Farmers denied that it was liable under the policies because the motorcycle on which David had been riding was not an insured vehi-

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[196]117 Ind. 97, 19 N.E. 722 (1889).

[197]*Id.* at 101, 19 N.E. at 723.

[198]*Id.*

[199]128 Ind. 25, 27 N.E. 124 (1891).

[200]*Id.* at 30-31, 27 N.E. at 126.

[201]*See* 15 J. APPLEMAN, *supra* note 32, § 8404; G. COUCH, *supra* note 39, § 32:135.

[202]Union Ins. Exch., Inc. v. Gaul, 393 F.2d 151 (1968); Guardian Life Ins. Co. of America v. Brackett, 108 Ind. App. 442, 27 N.E.2d 103 (1940); Painter v. Massachusetts Mut. Life Ins. Co., 77 Ind. App. 34, 133 N.E. 20 (1921).

[203]392 N.E.2d 520 (Ind. Ct. App. 1979).

cle under any of the policies. Farmers also claimed that David had been contributorily negligent.[204]

Each of the three policies contained the following arbitration clause:

> 4. Arbitration: If any insured making claim hereunder and the Company do not agree that such insured is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle because of bodily injury to the insured, or do not agree as to the amount payable hereunder, then either party, on written demand of the other, shall institute arbitration proceedings by serving upon the other a formal demand for arbitration.[205]

Farmers demanded that the claims be submitted to arbitration. The McNalls filed suit instead to establish four things: (1) the existence of coverage; (2) Waterson was an uninsured motorist; (3) Waterson's liability; and (4) the amount of damages.[206] Farmers moved to dismiss and to order the McNalls to go to arbitration. The trial court granted summary judgment in favor of the McNalls on the issue of the existence of coverage and determined that Waterson was an uninsured motorist. The liability of Waterson and the amount of damages were tried to a jury. The senior McNall was awarded $6,000 damages, but David was awarded nothing.[207] David and Farmers appealed. The court addressed and resolved six issues.[208] Only one of these will be considered here: whether the trial court erred in denying Farmers' motion to require arbitration.

The court of appeals found that arbitration was required on three issues only: (1) the existence of an uninsured motorist; (2) the liability of that uninsured motorist to the insured; and (3) the amount of damages.[209] Because the question of whether the policies covered David was not one of these issues, arbitration was not required and the issue could be determined by a court of law.[210] The court of appeals also found that the trial court properly retained jurisdiction over the dispute after deciding the issue of coverage.[211] The court stated that Indiana had never dealt with the issue of whether denial of coverage was a waiver of an arbitration provision,[212] but

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[204] *Id.* at 521.

[205] *Id.* at 522.

[206] *Id.* at 521.

[207] *Id.* at 521-22.

[208] *Id.* at 522.

[209] *Id.*

[210] *Id.*

[211] *Id.* at 524.

[212] G. COUCH, *supra* note 39, § 50.108, cites two Indiana cases, Orient Ins. Co. v. Kaptur, 176 Ind. 308, 95 N.E. 230 (1911) and Milwaukee Mechanics' Ins. Co. v. Stewart,

that Indiana had "followed the general rule that denial of liability under an insurance policy is a waiver of the right to demand performance of conditions precedent."[213] In fact, the Indiana Supreme Court held in *Orient Insurance Co. v. Kaptur*[214] that where an insurer, after being given notice of the loss, denied all liability, the insured was relieved of an obligation to submit to arbitration before bringing suit.[215] The facts in *Kaptur* are not sufficiently clear to determine whether the issue was precisely the same as in *McNall*, but it is clear that Indiana has always followed the general rule that a denial of liability is a waiver of obligations under the contract.[216] If Indiana has never considered the precise issue in *McNall* before, the rule here is only a logical extension of previous cases.

Clearly some of the issues decided by the trial court in *McNall* were issues which the parties had agreed to submit to arbitration under the policies.[217] To the extent that the trial court decided these issues, the reasons behind arbitration are usurped. Those reasons include utilization of a less expensive means of dispute settlement and relief of crowded court dockets. Had the court held that the McNalls, after having brought suit to establish coverage, must stop that proceeding and begin a new one before an arbitrator, these policy reasons would be disserved.[218] Additionally, the amount of time necessary to settle the dispute would be increased.

In *Liddy v. Companion Insurance Co.*,[219] the court of appeals held an arbitrator did not have jurisdiction to interpret an insurance contract.[220] The insured, who owned two cars insured under one policy, sought arbitration on whether the insurer was required to pay the

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13 Ind. App. 640, 42 N.E. 290 (1895), for the proposition that the insurer's denial of liability on an insurance policy estops the insurer from insisting on arbitration when the insured brings an action on the policy.

[213]392 N.E.2d at 523 (footnote omitted). *See* Ohio Farmers Ins. Co. v. Vogel, 166 Ind. 239, 76 N.E. 977 (1906) (proof of loss); Globe Life Ins. Co. v. Miller, 94 Ind. App. 289, 180 N.E. 689 (1932) (proof of death); United States Health & Accident Ins. Co. v. Clark, 41 Ind. App. 345, 83 N.E. 760 (1908) (written notice of loss).

[214]176 Ind. 308, 95 N.E. 230 (1911).

[215]*Id.* at 311, 95 N.E. at 231.

[216]In Ohio Farmers Ins. Co. v. Vogel, 166 Ind. 239, 243, 76 N.E. 977, 978 (1906), the court said:

> The principle is old and thoroughly established that when a party repudiates a contract and denies liability under it, the performance of conditions precedent, such as notice, demand, tender and the like, are waived on the ground that the law will not require a thing to be done which the party entitled has excused, or given notice that it will be unavailing. This principle applies to insurance as well as other contracts.

[217]*See* text accompanying notes 205-06 & 210, *supra*.

[218]392 N.E.2d at 524.

[219]390 N.E.2d 1022 (Ind. Ct. App. 1979).

[220]*Id.* at 1029.

uninsured motorist coverage limits on each car,[221] presumably to avoid Indiana's rule against stacking.[222] The court held that the arbitration clause in the policy provided for arbitration of two issues only: "(1) whether . . . the insured . . . [was] legally entitled to recover damages *from the . . . operator of an uninsured automobile*; and (2) if so, the amount of damages . . . ."[223] It did not include the amount the insurance company would have to pay the insured.[224] Presumably, that amount would be the policy limits, but because the policy limit was the issue, an interpretation of the policy would be required. Interpretation of contracts involves questions of law, which the arbitrator did not have jurisdiction to decide.

H. Financial Responsibility Act

1. Effect of the Act.—The Indiana Court of Appeals, in *Grimes v. Government Employees Insurance Co.*,[225] reiterated that the Indiana Financial Responsibility Act[226] was not meant to be a compulsory insurance statute. Grimes was involved in an accident with Roberts, an Illinois resident. Grimes recovered a judgment against Roberts' estate for $275,000. Government Employees Insurance Company (GEICO), Roberts' insurer, paid to Grimes $20,000, which was the limit of liability for bodily injury sustained in a single accident. The policy contained a provision[227] under which GEICO obligated itself to pay an amount which an out-of-state motorist would be required to maintain under an applicable financial responsibility law. The minimum amount stated in the Indiana Financial

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[221] *Id.* at 1024.

[222] *See* text accompanying notes 108-27 *supra*. The "separability clause" in *Liddy* did not apply to the uninsured motorist coverage. 390 N.E.2d at 1033.

[223] 390 N.E.2d at 1028.

[224] *Id.*

[225] 402 N.E.2d 50 (Ind. Ct. App. 1980).

[226] IND. CODE §§ 9-2-1-1 to -45 (1976 & Supp. 1980).

[227] The policy provision read:

> It is agreed that, subject to all the provisions of our policy except where modified herein, the following provision is added:
>
> If, under the provision of the motor vehicle financial responsibility law of any state or province, a non-resident is required to maintain insurance with respect to the operation or use of a motor vehicle in such state or province and such insurance requirements are greater than the insurance provided by the policy, the limits of the company's liability and the kinds of coverage afforded by the policy shall be set forth in such law, in lieu of the insurance otherwise provided by the policy, but only to the extent required by such law and only with respect to the operation or use of a motor vehicle in such state or province . . . .

402 N.E.2d at 51.

Responsibility Act was $30,000.[228] Grimes brought an action to compel GEICO to pay an additional $10,000, the difference between the $30,000 required by the Act and $20,000 already collected.[229] The trial court held for GEICO.[230]

In affirming the trial court,[231] the court of appeals quoted extensively from *Green v. State Farm Mutual Automobile Insurance Co.*[232] and *Hill v. Standard Mutual Casualty Co.*[233] In *Green*, one Whitaker obtained insurance from State Farm while in Mississippi, and then moved to Indiana where he was involved in an accident with Green. Green sued Whitaker and State Farm defended. State Farm then filed an action to determine the limit of its liability. The policy limit was $5,000 less than the amount required by the Financial Responsibility Act in force at the time.[234] The court of appeals refused to require an additional $5,000 recovery because it found that the Act was not compulsory insurance law.[235] Proof of financial responsibility was defined in the Act as "proof of ability to respond in damages for liability *thereafter incurred*, arising out of the ownership, maintenance or use of a motor vehicle."[236] The court reasoned that no proof of responsibility is required until after the first accident and no recovery on that required insurance could be obtained until the driver was involved in a second accident. Therefore, Green could not recover.[237]

In *Hill*, the Seventh Circuit Court of Appeals held that a policy was not rendered ambiguous as to whether a guest in an automobile could recover from the insurer, by a provision protecting the insured from liability imposed by a state's financial responsibility act.[238] The court said:

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[228]IND. CODE § 9-2-1-15 (1976), in effect at the time of the accident, read:
Proof of financial responsibility shall mean proof of ability to respond in damages for liability thereafter incurred, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of fifteen thousand dollars [$15,000] because of bodily injury to or death of any one [1] person . . . in the amount of thirty thousand dollars [$30,000] because of bodily injury to or death of two [2] or more persons in any one [1] accident, and in the amount of ten thousand dollars [$10,000] because of injury to or destruction of property in any one [1] accident. Proof in the amounts required by this section shall be furnished for each motor vehicle registered by such person.

[229]402 N.E.2d at 51.

[230]*Id.*

[231]*Id.* at 54.

[232]168 Ind. App. 434, 343 N.E.2d 828 (1976).

[233]110 F.2d 1001 (7th Cir. 1940).

[234]168 Ind. App. at 435-37, 343 N.E.2d at 829-30.

[235]*Id.* at 438, 343 N.E.2d at 831.

[236]IND. CODE § 9-2-1-15 (1976) (emphasis added).

[237]168 Ind. App. at 439, 343 N.E.2d at 831.

[238]110 F.2d at 1006.

> In our opinion this particular law seeks to increase public protection in respect to motor vehicle operation. But the Indiana Law is not a general compulsory insurance law. It merely guarantees the ability of a selected group of drivers or owners to respond in damages for future accidents. In other words, the Indiana Financial Responsibility Law protects the victim against the automobile operator's second accident, and in this case it was the operator's first accident.[239]

In *Grimes* the Indiana Court of Appeals held that at the time of the accident Roberts was not required to maintain insurance to drive his car in Indiana and therefore State Farm did not have to pay the amount required under the Financial Responsibility Act.[240] The court went on to justify the holding on the basis that the Act was intended to operate in futuro.[241]

The interpretation in *Green*, as followed in *Grimes*, of the Indiana Financial Responsibility Act is probably correct. Financial responsibility laws are intended to require liability insurance as a condition of using the highways but only after the driver has been involved in an accident.[242] The purpose of these laws, though, is to protect the public and to provide a fund from which persons injured by negligent operation of automobiles may recover.[243] To the extent that victims of accidents with out-of-state motorists cannot be assured of this fund unless the driver has previously had an accident in Indiana, this purpose may possibly be thwarted.

2. "No Action" Clause.—In *American Underwriters Inc. v. Curtis*,[244] Curtis and other claimants were involved in an accident with Johnson. Johnson was insured by American Underwriters (AUI) under a policy issued pursuant to the Indiana Financial Responsibility Act.[245] The claimants sued and obtained a default judgment against Johnson in excess of $50,000. Proceedings supplemental were then brought against AUI to recover on the insurance policy.[246] The trial court held AUI liable for the $30,000 policy limit.[247] AUI appealed, raising two issues: (1) Is suit by the claimants against AUI

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[239] *Id.*
[240] 402 N.E.2d at 53.
[241] *Id.* at 54.
[242] 7 AM. JUR. 2d *Automobile Insurance* § 20 (1980).
[243] *Id.* § 22.
[244] 392 N.E.2d 516 (Ind. Ct. App. 1979).
[245] IND. CODE §§ 9-2-1-1 to -45 (1976 & Supp. 1980).
[246] 392 N.E.2d at 517-18.
[247] *Id.* at 518.

barred under the "no action" clause of the Financial Responsibility Act, because there was no final judgment after an actual trial? and (2) Is the action barred because of a failure to give notice to AUI of the suit against the insured?[248]

The "no action" clause of the Indiana Financial Responsibility Act states: "No action shall lie against the insurance carrier by or on behalf of any claimant under the policy until after final judgment has been obtained after *actual trial* by or on behalf of any claimant under the policy."[249] AUI contended that a default judgment falls short of an actual trial and that the claimants could not recover on the policy until they had established Johnson's liability in a contested trial. The court found the reasoning logical but was not convinced that the Act required a claimant to force the insured to answer a complaint and contest the action.[250] In any case, AUI failed to specifically plead this defense in its answer to the claimants' action or at a hearing on the matter. Because the matter was neither raised nor tried by implied consent, the issue was waived by AUI.[251] The court indicated its reluctance to permit an insurance company to wait until an adverse judgment was obtained before raising its defense.[252]

AUI also claimed that the act "impliedly required"[253] the claimants to give notice to AUI of their suit against Johnson. The court held, however, that "notice is neither contemplated nor required under the Financial Responsibility Act."[254] Liability becomes absolute whenever loss or damage covered by a policy occurs. The court refused to insert a notice requirement that was not intended by the legislature.[255]

The question remains whether the court would have set aside the default judgment and permitted the insurance company to defend on behalf of the insured in an actual trial against the plaintiff, had the company raised the lack of notice at the earliest possible moment. In all fairness, an insurance company should have the opportunity to raise policy defenses before becoming bound by a judgment. A requirement that the third party give notice to the insurance company when it brings suit against a party whom it knows to be insured would assure the company of every opportunity to defend.

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[248] *Id.*

[249] IND. CODE § 9-2-1-5(c) (Supp. 1980) (emphasis added).

[250] 392 N.E.2d at 518 n.2.

[251] *Id.* at 519.

[252] *Id.* at 519 n.4.

[253] *Id.* at 519.

[254] *Id.*

[255] *Id.*

XII. Labor Law

EDWARD P. ARCHER

A. The IPS *Strike*

Public Law 217[1] provides that public school employers and certificated school employees "shall have the obligation and the right to bargain collectively" and "shall enter into a contract embodying any of the matters on which they have bargained collectively."[2] It gives certificated school employees "the right to form, join or assist employee organizations"[3] and provides that it shall be unfair for a school employer[4] or a school employee organization or its agents to engage in certain acts.[5] The law also established the Indiana Education Employment Relations Board (EERB) to determine bargaining units, process unfair labor practice charges, conciliate and mediate, and research school employer-employee matters.[6]

Public Law 217 makes it unlawful for school employees to strike.[7] Nonetheless, on August 26, 1979, the teachers employed by the Indianapolis Public Schools (IPS) voted to strike when their contract with IPS expired unless IPS met the demands of the teachers' collective bargaining representative, the Indiana Education Association (IEA).

In an effort to get striking teachers back in the classroom, five parents of IPS students brought an action to enjoin the teachers' strike. The Marion County Circuit Court, in its initial hearing, concluded that the plaintiffs had standing to bring the action. In addition, the court held that the strike was unlawful and consequently ordered the teachers to return to their classrooms.[8] Furthermore, the court orally directed the school board to: 1) Offer the teachers a seven percent wage increase, 2) drop a collective bargaining proposal concerning the length of the teaching day, 3) agree to a contract with the IEA by a specific date, and 4) deliver all books and records pertaining to financial information of the school system to

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[1]Act of April 24, 1973, Pub. L. No. 217, 1973 Ind. Acts 1080 (currently codified at IND. CODE §§ 20-7.5-1-1 to -14 (1976 & Supp. 1980)). Hereinafter all references to Public Law 217 will be cited to the applicable Indiana Code provisions.

[2]IND. CODE § 20-7.5-1-3 (1976).

[3]*Id.* § 20-7.5-1-6.

[4]*Id.* § 20-7.5-1-7(a).

[5]*Id.* § 20-7.5-1-7(b).

[6]*Id.* § 20-7.5-1-9 (Supp. 1980).

[7]*Id.* § 20-7.5-1-14 (1976).

[8]Chenoweth v. Brown, No. C79-2123 (Marion County Cir. Ct., Sept. 12, 1979).

be used to resolve the strike controversies.[9] This oral directive was not included in the court's written order.[10] When no agreement was reached by the designated date, the court ordered bargaining teams for both the school board and the IEA sequestered indefinitely until an agreement was reached. The next day, the court orally directed the school board to assign all returning striking teachers to their regular assignments rather than to classrooms where the IPS felt they were most needed.

Meanwhile, the negotiators remained sequestered until they were released pursuant to an emergency order issued by the Indiana Supreme Court.[11] The school board had sought the emergency order and had filed a petition for writ of prohibition asking the supreme court to order the circuit court to expunge from its records its initial oral orders and its subsequent order to sequester. The school board also objected to the lower court's order which required it to assign all returning teachers to their regular assignments. The school board requested the supreme court to set aside each of these orders and to prohibit the circuit court from issuing further orders exceeding its jurisdiction.

In support of its petition, the school board argued that the lower court had jurisdiction to enjoin the strike under Indiana Code section 20-7.5-1-14(b),[12] but did not have jurisdiction to issue any of the orders. The school board contended that the circuit court had no jurisdiction under Public Law 217 to question the good faith bargaining of one of the parties until after a determination by the EERB on an unfair labor practice charge.[13] Because no such charge had been filed with the EERB, the school board alleged the trial court was without jurisdiction.

The school board also urged that the circuit court was without jurisdiction because of the IEA's failure to follow administrative

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[9]The school board's offer at that point in the negotiations was a one percent wage increase.

[10]These facts are taken from the assertions of the school board in its Relator's Verified Petition of Prohibition and Mandate at 3, State *ex rel.* Bd. of School Comm'rs v. Marion Circuit Court, No. 979 S 256 (Ind., filed Sept. 21, 1979), which assertions were admitted by the circuit court in its response to that petition. Response of Respondents to Verified Petition for Writ of Prohibition and Mandate at 1.

[11]State *ex rel.* Bd. of School Comm'rs v. Marion Circuit Court, No. 979 S 256 (Ind., Sept. 21, 1979).

[12]IND. CODE § 20-7.5-1-14(b) (1976) provides in part: "Any school corporation or school employer may, in an action at law, suit in equity, or proper other proceeding, take action against any school employee organization . . . or any person aiding or abetting in a strike, for redress of such unlawful act."

[13]The EERB, created by IND. CODE § 20-7.5-1-9 (1976), has the power to process unfair labor practice charges between school boards and teachers in Indiana.

procedures and to exhaust administrative remedies.[14] It contended that the circuit court could not create special proceedings in equity contrary to those provided for in the statute governing reviews of the EERB.[15]

The IEA opposed the petition by arguing that the court's directives relating to the specific salary increase, the proposal regarding the length of the school day, the directed time limits for reaching agreements, and reassignment of returning teachers were all oral and thus, should not be considered by the supreme court. In addition, the IEA contended that once the circuit court had properly assumed jurisdiction, it had authority under its general grant of equity jurisdiction to issue orders and take necessary remedial measures to conclude the teachers' strike. It contended that the court had found the school board guilty of failing to bargain in good faith and had "exercised its discretion in a manner intended to give the board negotiators an added incentive to perform their obligations under Public Law 217."[16] The IEA asserted that the court's orders were not inconsistent with Public Law 217[17] and that the court had the authority as a court of equity to impose reasonable terms and conditions when granting injunctive relief.[18] The IEA fur-

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[14]The school board cited Decatur REMC v. PSC, 150 Ind. App. 193, 275 N.E.2d 857 (1971), in which the appellate court stated:

> [T]his defense [the failure to exhaust administrative remedies] is available at any time before final decision and in any manner, and if not raised by a party it is our duty, *sua sponte* to raise and determine it. . . .
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> . . . .
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> . . . It is our opinion that the parties to this appeal did not exhaust their administrative remedies and, therefore, the trial court did not have subject-matter jurisdiction to invoke permanent equity.

Id. at 197-98, 275 N.E.2d at 860.

[15]IND. CODE §§ 4-22-1-1 to -30 (1976).

[16]Brief for IEA in Opposition to Verified Petition for Writ of Prohibition and Mandate at 3.

[17]In this regard, the IEA quoted IND. CODE § 20-7.5-1-2(n) (1976), which defines the obligation to bargain collectively as: "the mutual obligation of the school employer and the exclusive representative to meet at reasonable times to negotiate in good faith . . . ." Brief for IEA in Opposition to Verified Petition for Writ of Prohibition and Mandate at 3.

[18]To support this argument the IEA cited Inland Steel Co. v. United States, 306 U.S. 53 (1939) in which the United States Supreme Court stated:

> A court of equity "in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as a court of equity, that has been exercised from time immemorial."

Id. at 156 (quoting Russell v. Farley, 105 U.S. 433, 438 (1881)). The IEA also cited Wabash Valley Coach Co. v. Turner, 221 Ind. 52, 46 N.E.2d 212 (1943), in which the Indiana Supreme Court stated:

ther contended that the court's action in sequestering the bargaining teams was a reasonable and necessary condition to protect the interest of the public and the parties and to enforce the mandate of Public Law 217; therefore, such action fell within the court's wide scope of equitable discretion.

Three days after its emergency order, the supreme court granted an alternative writ of prohibition and mandate ordering the circuit court to: 1) vacate all of the orders in question, 2) refrain from issuing further orders exceeding the jurisdiction granted by Public Law 217, and 3) "only provide a remedy to plaintiffs against an unlawful strike."[19] However, it gave no opinion to explain its issuance of the writ.

The litigation leading to the writ issued by the supreme court has two significant aspects. The first relates to the standing question. The second deals with the scope of the remedial power of a trial court when exercising its jurisdiction under Public Law 217.

1. Standing under Public Law 217.—The question of standing was not argued to the supreme court in this case. However, Public Law 217 specifically provides that "any school corporation or school employer may . . . take action against . . . any person aiding or abetting in a strike."[20] The explicit language of the Act provides standing only for school corporations or school employers. It grants no standing to taxpayers, members of the general public or, as were involved in this case, parents of school childen to bring such an action.

The circuit court, nevertheless, held that the plaintiffs, parents of school children at the struck schools, had standing. This decision was not questioned by the IEA, possibly because it did not wish to interfere with the court's efforts to resolve the strike, nor by the school board, which would benefit from an injunction issued to end the strike.

> The purpose of this action is not to bring about some equitable adjustment of rights between the parties, but to take advantage of a legal technicality, the effect of which would be to work an unconscionable wrong and injustice. A court of equity will not lend itself to such an enterprise. This attitude has been expressed in many ways. Courts of equity are courts of conscience which do not bind themselves by strict rules of law. Equity looks beneath the rigid rules to find substantial justice. It has power to prevent strict legal rules from working injustice.

Id. at 65, 46 N.E.2d at 217.

[19]State *ex rel.* Bd. of School Comm'rs v. Marion Circuit Court, No. 979 S 256 (Ind., Sept. 24, 1979) (Alternative Writ of Prohibition and Mandate). The supreme court ordered the circuit court to show cause, on or before October 5, 1979, why this writ should not be made permanent. The School Board's request for a change of venue had been granted by the circuit court when the writ issued. Accordingly, no further proceedings were held pertaining to this writ.

[20]*See* note 12 *supra.*

Two principal factors must be analyzed when considering the standing question. The first is the political nature of the school board. The school board's opposition to the circuit court's action took on considerable political significance because one of the named plaintiffs in the action seeking injunctive relief was a former school board member who had not been reelected.

Another factor in the standing question is the delicate nature of the bargaining process, especially in the public sector. Strikes are not readily resolved by the issuance of an injunction. In fact, a strike may even be prolonged by an action seeking injunctive relief.[21]

These two factors are obviously interrelated. Strike issues could be aggravated and the strike prolonged by prospective candidates for the school board suing as parents, or as public representatives, seeking to embarress the existing school board and to stage a platform for future election efforts. It is a questionable practice to allow persons who are not elected and are not publicly accountable to control the labor relations decision of whether and when to seek injunctive relief. Public Law 217 does not specifically grant standing to such people and should not, therefore, be construed in this manner. If the elected school board members fail in their labor relations responsibilities, the public remedy is to exert public pressure during the strike or to oust the members in the next election. The court's construction of standing under Public Law 217 affords the public no safeguards against a plaintiff, uninformed of the details of the bargaining process, who files a court action which may aggravate rather than aid the bargaining process.

2. *Scope of the Trial Court's Remedial Power.*—The second significant area of this litigation pertains to the scope of the remedial power of a trial court in an action for injunctive relief against an illegal strike under Public Law 217. Even though this issue was litigated before the Indiana Supreme Court, the court issued no opinion in support of its writ.[22] Consequently, its action is open to several interpretations.

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[21]In a study of 22 presumably unlawful strikes in the public sectors of San Francisco and Sacramento between January 1969, and July 1972, the author concluded that even though legal relief was sought for 18 of the strikes, a court order clearly resulted in the cessation of the strike in only two cases. The author also concluded that strikes with legal sanctions lasted an average of 23 1/2 days, contrasted with an average of 11 1/2 days for strikes without such sanctions. *See* Cebulski, *An Analysis of 22 Illegal Strikes and California Law*, 18 CAL. PUB. EMPLOYEE REL. 2 (1973).

[22]It should be recognized that the supreme court issued this writ in an expedited procedure during a period of emergency. In fact, it found that emergency matters existed regarding the sequestration of the bargaining teams and issued a temporary emergency order on September 21, 1979, just three days before the issuance of its

One possible interpretation of Public Law 217 would restrict trial courts to reviewing unfair labor practice determinations of the EERB and to issuing injunctions to enjoin teacher strikes. The courts would have no equity jurisdiction to consider remedial measures, other than injunctions, to bring the strike to an end. This interpretation is not desirable from a public policy viewpoint. The following interpretation is more realistic and more attuned to the purposes of Public Law 217.

The Marion County Circuit Court clearly exceeded its authority in this case. Most of its orders were in direct conflict with the express language of Public Law 217. Under Public Law 217, neither the EERB nor the trial court may require the school board to offer a specific increase, to withdraw from a lawful bargaining demand, or to agree to a contract by a specific time. The duty to bargain collectively under the law is defined as not including "the final approval of any contract concerning [bargainable] or any other items."[23] The definition also states: "The obligation to bargain collectively does not require the school employer or the exclusive representative to agree to a proposal of the other or to make a concession to the other."[24]

The language of the Act clearly prohibits any of the orders issued by the circuit court.[25] Similarly, it prohibits a trial court from ordering a school board to assign returning teachers in any particular way. This, in effect, would impose upon the school board a specific agreement which had not been accepted in negotiations.

Additionally, the Act precludes a trial court from sequestering the bargaining teams indefinitely. The obligation to "bargain collectively" under the Act "means the performance of the mutual obligation of the school employer and the exclusive representative to meet *at reasonable times* to negotiate in good faith . . . ."[26] It is inconsistent with this definition to order continuous bargaining for an indefinite period.

The final directive of the circuit court was the order to deliver all books and records pertaining to financial information of the school system. This may have been inconsistent with the act but its

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writ. State *ex rel.* Bd. of School Comm'rs v. Marion Circuit Court, No. 979 S 256 (Ind., Sept. 21, 1979) (Temporary Emergency Order).

[23]IND. CODE § 20-7.5-1-2(n) (1976).

[24]*Id.*

[25]This language of the act was patterned after section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) (1976). In H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970), the Supreme Court held that the National Labor Relations Board (NLRB) was precluded under section 8(d) from ordering an employer to agree to a specific proposal to remedy an unfair labor practice of refusing to bargain.

[26]IND. CODE § 20-7.5-1-2(n) (1976) (emphasis added).

inconsistency was not as blatant. The counterpart language of section 8(d) of the National Labor Relations Act, after which the Indiana Act was patterned, has been construed to require the production of financial information in the negotiations only when the employer raises the issue of his inability to pay.[27] If this interpretation were applied to Public Law 217, the school board could have been required to produce financial data because the school board contended that it was unable to pay the seven percent increase in teachers' salaries ordered by the circuit court. However, even if the court's order to deliver financial information was consistent with Public Law 217, the supreme court's writ compelling the court to vacate this order is explainable in terms of the school board's contention that the "failure to follow the administrative proceedings or to exhaust administrative remedies deprives a court of subject matter jurisdiction in equity."[28]

In essence, this explanation of the supreme court's action allows a trial court to retain equity jurisdiction to consider remedial measures to resolve an unlawful teachers' strike under the following conditions: The remedial measures must not be in conflict with either party's rights under the act; and, the beneficiary of the remedial relief must have pursued its administrative remedies with the EERB.

This interpretation of Public Law 217 is more desirable. To interpret the law as permitting a trial court to provide only the *legal* relief specifically authorized, ignores the statutory language which specifically authorized actions at either law *or* in equity for redress of unlawful strikes.[29]

This interpretation is also more desirable from a public policy viewpoint because the issuance of an injunction generally will not result in the immediate end of the strike.[30] A trial court should retain the flexibility necessary to seek solutions to the problems which are blocking the parties' agreement. For example, if the exclusive representative of the teachers has filed a charge with the EERB of

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[27]29 U.S.C. § 158(d) (1976) states in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

[28]Brief for Relator in Support of Verified Petition for Writ of Prohibition and Mandate at 9-10.

[29]IND. CODE § 20-7.5-1-14(b) (1976).

[30]*See* note 21 *supra*.

refusal to bargain in good faith, and it is clear that the school board has not met its statutory obligation, the trial court should be permitted to condition its grant of injunctive relief upon the school board's compliance with its duty to bargain collectively.[31]

This flexibility is essential because Public Law 217 provides no incentive for a school employer to bargain. The unfair labor practice procedures before the EERB take far too long to be effective within the duration of a single bargaining period. Under the dispute settlement procedures provided in Public Law 217, the parties continue the status quo and the employer may issue tentative contracts and prepare its budget based upon the status quo if no agreement is reached.[32] Thus, school employers have no incentive, especially during inflationary periods, to seek agreements.

B. Remedial Powers of the EERB

State ex rel. Board of Trustees v. Knox Circuit Court[33] was apparently the final appellate court opinion in the litigation involving the Worthington-Jefferson Consolidated School Corporation. In its previous opinions, the court of appeals concluded that the EERB is only a fact-finding body with power to issue interlocutory or temporary orders but without power to issue a final order of reinstatement of an unlawfully discharged teacher.[34] The court also concluded

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[31]The development of defenses to the issuance of injunctions against unlawful public strikes is traced in Timberlane Regional School Dist. v. Timberlane Regional Educ. Ass'n, 114 N.H. 245, 317 A.2d 555 (1974). In that case the Supreme Court of New Hampshire stated:

> [I]t would be detrimental to the smooth operation of the collective bargaining process to declare that an injunction should automatically issue where public teachers have gone on strike. . . . The essence of the collective bargaining process is that the employer and the employees should work together in resolving problems relating to the employment.

Id. at 251, 317 A.2d at 558-59 (citations omitted). The court concluded: "[I]n deciding to withhold an injunction the trial court may properly consider among other factors . . . whether negotiations have been conducted in good faith, and whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue." *Id.*, 317 A.2d at 559. New Hampshire, as Indiana, has no legislation requiring the issuance of an injunction against unlawful public strikes. Indiana Public Law 217 merely authorizes the school employer or corporation to "take action . . . for redress of such unlawful [strike]." IND. CODE § 20-7.5-1-14(b) (1976). The Indiana courts are not prevented from following the wisdom of the New Hampshire decision and the decisions cited therein.

[32]IND. CODE § 20-7.5-1-12(e) (1976).

[33]390 N.E.2d 232 (Ind. Ct. App. 1979).

[34]*See* Board of School Trustees v. IEERB, 380 N.E.2d 93 (Ind. Ct. App. 1978); Board of School Trustees v. IEERB, 375 N.E.2d 281 (Ind. Ct. App. 1978); IEERB v. Board of School Trustees, 355 N.E.2d 269 (Ind. Ct. App. 1976). For a discussion of prior

that when reviewing an EERB decision, a trial court had the authority to " 'fashion a remedy to cure whatever injustice has taken place.' "[35]

Assuming the *Worthington* case to be the final interpretation of the EERB's authority, the EERB cannot offer reinstatement as a remedy for a school teacher who has been discharged in violation of the Act.[36] The court's basis for this decision was a literal interpretation of Public Law 217. The EERB has explicit authority under the act to "enter such interlocutory orders after summary hearing as [the EERB] deems necessary in carrying out the intent under this chapter";[37] however, the EERB is without explicit authority to grant any other relief. The court's rationale inevitably leads to the conclusion that the EERB has no remedial power other than to issue interlocutory orders. This would not preclude the EERB from issuing recommended orders,[38] but such orders would be subject to de novo consideration in a trial court.

This procedure could cause the EERB to assume the role of an advocate rather than a decision maker. Remedies will emanate from a plurality of trial courts rather than a single agency; consequently, there will be variation and possible inconsistency in the remedies granted. Trial judges may perceive their remedial authority as like that of a private arbitrator rather than that of the NLRB under the National Labor Relations Act.[39] Arbitrators exercise much more flexibility when reinstating employees than does the NLRB. Arbitrators' remedies range from no back pay to partial or full back pay. In contrast, the NLRB customarily grants full back pay with its reinstatement orders.

Trial judges' remedies for other unfair labor practice violations may also vary from those recommended by the EERB. For example, the EERB has held that the failure to discuss the non-renewal of a teacher's contract with the exclusive bargaining representative is a breach of section 7(a)(5) of Public Law 217[40] and should be remedied by reinstatement.[41] This type of violation is difficult to remedy. An

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litigation of this case, see Darko, *Labor Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 295, 307-12 (1980).

[35]390 N.E.2d at 234 (quoting Board of School Trustees v. IEERB, 380 N.E.2d 93, 95 (Ind. Ct. App. 1978)).

[36]*See* IND. CODE § 20-7.5-1-1 to -14 (1976 & Supp. 1980).

[37]*Id.* § 20-7.5-1-11 (1976).

[38]The EERB has changed its practice and now issues recommended orders of reinstatement.

[39]29 U.S.C. §§ 151-169 (1976).

[40]IND. CODE § 20-7.5-1-7(a)(5) (1976).

[41]For example, in Carroll Consol. School Corp., EERB Case No. U-78-17-0750 (June 22, 1979), the EERB adopted the hearing examiner's findings of fact and conclu-

order simply to discuss the failure to renew would not be satisfactory because the discussion occurs after the school corporation has a commitment, strengthened by litigation, not to renew the contract. On the other hand, if the school corporation had discussed the matter before deciding not to renew the contract, it would have had the right to refuse to renew that contract. Reinstatement may put the teacher in a better position than he or she would have been in had the breach not occurred. The teacher's gain would depend on the timing of the reinstatement. For example, if the teacher were reinstated early in the school year, he or she may have sufficient time to overcome the difficulties which had led to the threatened non-renewal. Reinstatement later in the school year, however, would not offer such an opportunity, and a prompt non-renewal for the next year would render the reinstatement remedy a hollow victory. On the other hand, an order of reinstatement any time after personnel contracts are made for the school year causes problems for the school corporation which must deal with the replacement teacher who is also under contract. It is predictable that trial judges could differ substantially upon the appropriate remedy for such an unfair labor practice.

These problems and others may arise because the court of appeals in *Worthington* held that the remedy questions under Public Law 217 are to be decided by the trial courts. Trial judges are likely to balance these considerations differently and come up with a variety of remedies even though the facts of the cases may be similar.

Remaining questions concern the role of the EERB staff in the remedy proceeding. Should the EERB have authority to reject settlement terms which are acceptable to the teacher representative, the teacher, and the school corporation? If a school corporation fails to appeal promptly or comply voluntarily with the EERB recommended order, does the burden fall upon the charging party or the EERB to seek enforcement of the EERB's order? If the EERB does not act, the charging party would have to obtain counsel to continue the litigation, thereby raising the question as to whether the charging party could recover attorney's fees.

In short, the narrow interpretation of the EERB's remedy power given by the court of appeals in *Worthington* substitutes for the former system, which permitted the EERB considerable discretion in determining appropriate remedies, one in which a trial court,

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sions of law that the school board had committed an unfair practice in violation of IND. CODE § 20-7.5-1-7(a)(5) (1976) when it refused to discuss the proposed non-renewal of a teacher's contract for the 1978-79 school year. However, the EERB modified the examiner's order by ordering reinstatement with full back pay plus eight percent interest which the examiner had not ordered.

after a de novo remedy hearing, exercises its discretion. The EERB's expertise and experience will no longer be controlling. A lack of uniformity certainly will result. Whether the EERB will control settlement efforts and provide counsel through judicial review proceedings will have to be resolved in future litigation.

C. Teacher Bargaining Act

Just as *Worthington* involved a series of appellate decisions, the case of *Evansville-Vanderburgh School Corp. v. Roberts*[42] involved a great deal of appellate activity within a single year. The Evansville Teachers Association (ETA)[43] filed unfair labor practice charges alleging that the Evansville-Vanderburgh School Corporation (EVSC) had implemented a teacher evaluation plan without any discussion with the ETA. The ETA also charged that the plan was promulgated by a committee of non-member school teachers chosen by the administration without consultation with the ETA. The EERB found that the EVSC had committed an unfair labor practice. The EVSC sought review of this decision.

The trial court found for the ETA, and this judgment was sustained by the court of appeals[44] and by the Indiana Supreme Court.[45] All three appellate decisions were issued within one year. The supreme court adopted the court of appeals' decision that the EVSC had violated section 7(a)(5) of Public Law 217[46] by failing to discuss the teacher evaluation plan with the ETA before it was implemented. Public Law 217 includes "working conditions" in the list of topics for discussion.[47] The court held that the teacher evaluation plan was such a "working condition" by noting that " '[t]he "philosophy" of the plan is to maintain high teacher competence by means of self-evaluation forms, classroom observation by "evaluators," and an evaluation conference' " and that the plan could " 'result in a recommendation for a change of assignment or dismissal.' "[48] The court concluded that the factors which were to be

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[42]395 N.E.2d 291 (Ind. Ct. App. 1979).

[43]The ETA was the exclusive bargaining representative of the Evansville-Vanderburgh School Corporation teachers.

[44]392 N.E.2d 810 (Ind. Ct. App. 1979), *vacated*, 395 N.E.2d 291 (Ind. Ct. App. 1979).

[45]The supreme court found no reversible error in the judgment of the trial court and, therefore, affirmed its opinion. Evansville-Vanderburgh School Corp. v. Roberts, 405 N.E.2d 895 (Ind. 1980).

[46]IND. CODE § 20-7.5-1-7(a)(5) (1976) provides in part that it is "an unfair practice for a school employer to . . . (5) refuse to bargain collectively or discuss with an exclusive representative . . . ."

[47]*See* IND. CODE § 20-7.5-1-5 (1976).

[48]405 N.E.2d at 898 (quoting 395 N.E.2d at 294).

considered under the plan " 'significantly touch and concern everyday activities of school teachers, and, therefore, are within the ordinary understanding of "working conditions." ' "[49]

The EVSC had raised a defense of good faith by arguing that the superintendent was merely under a misapprehension of what constituted discussable topics. The court rejected this argument by distinguishing between the process of discussion, which it concluded was " 'governed only by the somewhat elastic standard of good faith,' "[50] and a total failure to discuss a discussable topic. The failure to discuss a discussable topic is not subject to a defense of good faith because " 'the good or bad faith of the parties is irrelevant as to whether an unfair [labor] practice has occurred.' "[51]

This distinction is sound. The court's holding closely parallels the United States Supreme Court decision in *NLRB v. Katz*,[52] in which the Court held that good faith was not a defense to a refusal-to-bargain charge under the NLRA when an employer was charged with unilaterally changing terms and conditions of employment. The Supreme Court concluded that "the duty [to bargain] may be violated without a general failure of subjective good faith . . . if a party has refused even to negotiate *in fact*—'to meet . . . and confer'—about any of the mandatory subjects."[53] Even though the EVSC sought committee assistance and thus did not act *unilaterally*, the committee was *independent* of the ETA; consequently, the EVSC violated its statutory obligation to discuss the teacher evaluation plan with the ETA.

The court next considered whether the EVSC had violated section 7(a)(1) of Public Law 217[54] by selecting an evaluation committee without consultation with, or membership from, the ETA. The court recognized that this question was more sensitive because the school board had set up numerous committees including school employees

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[49]*Id.* 405 N.E.2d at 898-99 (quoting 395 N.E.2d at 294). The factors to which the court referred included teaching methods, methods of correspondence with parents, written lesson plans, and communication skills, all of which were "working conditions" to the court.

[50]405 N.E.2d at 900 (quoting 395 N.E.2d at 295).

[51]405 N.E.2d at 900 (quoting 395 N.E.2d at 296) (footnote omitted).

[52]369 U.S. 736 (1962).

[53]*Id.* at 743 (footnote omitted).

[54]IND. CODE § 20-7.5-1-7(a)(1) (1976) states in part that it is an unfair labor practice to "interfere with, restrain or coerce school employees in the exercise of the rights guaranteed in Section 6 of this chapter." Section 6 provides: "(a) School employees shall have the right to form, join or assist employee organizations, to participate in collective bargaining with school employers through representatives of their own choosing and to engage in other activities, individually or in concert for the purpose of establishing, maintaining, or improving salaries, wages, hours, salary and wage related fringe benefits and other matters . . . ." *Id.* § 20-7.5-1-6.

through its administrative staff for the purpose of working on many items that are discussable under section 5(a) of the law.[55] The court sustained the finding of a violation by listing the following factors in support of the trial court's decision:

> "(1. [T]he ETA was the exclusive representative as defined in section 2(l)[i] (2. the evaluation committee was the instrumentality in the drafting and proposal of a discussable matter[;] (3. the ETA was unaware of the plan's promulgation, and (4. no ETA participation was involved in the appointment of members to the evaluation committee."[56]

The court's notation of these factors raises some question about the future application of *Evansville-Vanderburgh*. For example, would there have been a violation of section 7(a) if the ETA was represented on the committee or if the ETA was involved in appointing the committee? If ETA participation on the committee or in the selection of the committee is sufficient to avoid a section 7(a) violation, would it also fulfill section 5(a)'s discussion requirements?

The EVSC argued that it did not need to confer with the ETA. EVSC relied on section 2(o), which states that the obligation to bargain or to discuss any matter shall not "prevent the school employer or the superintendent from conferring with any citizen, taxpayer, student, school employee or other person considering the operation of the schools and the school corporation."[57] It also noted[58] the section 6 right of school employers to "manage . . . the operations and activities of the school corporation," which includes the right to "(1) direct the work of its employees [and] (2) establish policy."[59]

The court was thus required to interrelate the school employer's duty to bargain and discuss matters with employee representatives, with its general right to manage the school corporation, direct its employees, and establish policy. The difficulty in interrelating these factors is evidenced by the court of appeals vacating its original decision and the supreme court's supplementing the final court of appeals decision.

In each of these decisions the courts found the conduct of the EVSC in appointing a committee without consulting the ETA to be a violation of section 6(a). Thus, the variations in these decisions relate not to the finding of a violation but to the general interrelationship of these statutory provisions.

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[55]*Id.* § 20-7.5-1-5.

[56]405 N.E.2d at 901 (quoting 395 N.E.2d at 295-96).

[57]IND. CODE § 20-7.5-1-2(o) (1976).

[58]395 N.E. at 297.

[59]IND. CODE § 20-7.5-1-6 (1976).

In its initial opinion, the court of appeals stated that: "[D]iscussable topics trigger affirmative rights upon school employees and duties upon school employers. In order for such affirmative rights and duties to be given effect, the employer's rights unilaterally to confer and establish policy can only refer to matters that are not discussable or bargainable."[60] In its second opinion, the court retracted the latter sentence and stated instead: "In order for such affirmative rights and duties to be given effect, the employer's rights unilaterally to confer and establish policy can not be construed as an *ipso facto* excuse for an otherwise established unfair practice."[61]

The first position was properly withdrawn. If expansively applied, it could have required all school employer discussions concerning bargainable or discussable topics to be with the exclusive teacher representative, thereby eliminating school employees, citizens, taxpayers, and parents from these discussions. It also would have precluded unilateral establishment of policy regarding discussable issues by the school employer. These results could not reasonably have been the intent of the legislature. For example, section 2(o) specifically states that no agreement to a proposal or concession is required regarding discussable items.[62] Clearly after meaningful discussion is completed, the school corporation can unilaterally proceed to implement its final proposal relating to a discussable subject. Also, section 2(n) provides that the obligation to bargain collectively does not require an agreement or concession by either party to a proposal.[63]

The language of section 2(n) closely parallels section 8(d) of the National Labor Relations Act (NLRA) which has long been construed to permit a private employer unilaterally to change even mandatory subjects of bargaining as long as it has first bargained in good faith to an impasse and the change is one which was offered to, but rejected by, the union.[64]

Whether this is the interpretation the legislature intended for the language of section 2(n) is unclear. However, in view of the unambiguous language of section 2(o) and the long-standing NLRA precedent, it is not likely that the legislature intended to preclude all school corporation action regarding bargainable or discussable topics absent agreement with the teacher representative.

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[60]Evansville-Vanderburgh School Corp. v. Roberts, 392 N.E.2d 810, 816 (Ind. Ct. App. 1979).

[61]395 N.E.2d 291, 297 (Ind. Ct. App. 1979).

[62]IND. CODE § 20-7.5-1-2 (1976).

[63]*Id.* § 20-7.5-1-2(n).

[64]*See* NLRB v. Katz, 369 U.S. 736 (1962).

Therefore, the court of appeals properly withdrew from its original position. However, its second position provided no guidance concerning the interrelationship between a school employer's duties to bargain and discuss with the teachers' representative and its rights to manage and confer with other persons. This question was answered in part by the Indiana Supreme Court. The supreme court noted that "[b]oth the 'duty to discuss' and the 'right to confer' are in the statute and both must be given effect insofar as possible,"[65] and that "nothing in the statute or in this opinion would prohibit school employers from conferring with any persons they wish in order to gather and receive information."[66] Furthermore, a school employer is not prohibited from creating committees to assist in this process.[67] In addition, the court noted that the "committees may be composed of any concerned parents, students, teachers, experts, consultants or other concerned citizens" or even "entirely of school employees who are not members of the exclusive representative organization as long as the committee is gathering or receiving information which is only a partial input into the final formulation of policy."[68]

This seems a reasonable balance among the rights of the exclusive representative, the school corporation, and the general public to have opportunities for input into school decisions. It leaves largely unsettled the interrelationship of the school corporation's duty to bargain collectively and discuss appropriate topics with the exclusive representative, and its rights to manage the school corporation and establish policy. However, the court did establish that these rights of a school corporation do not relieve it of its duty to bargain collectively or to discuss appropriate issues. The questions regarding the issue of the school corporation's right to manage and to establish policy after fulfilling its duties to bargain or discuss were not before the court in this case; consequently, that issue may have to be litigated.

D. Interrelationship of the Teacher Contract Act, General Powers Act, and Teacher Bargaining Act

In *Brown v. Board of School Trustees*,[69] the Indiana Court of Appeals construed the limitations of a school corporation's power to make rules and regulations governing reappointment of non-tenured

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[65]405 N.E.2d at 901.
[66]*Id.*
[67]*Id.* at 901-02.
[68]*Id.* at 902.
[69]398 N.E.2d 1359 (Ind. Ct. App. 1980).

teachers in conjunction with the Teacher Tenure Act.[70] The plaintiff in *Brown* had been hired as an industrial arts teacher for three successive years. In April of the third year, the plaintiff was given a written evaluation by his principal which stated that it would be recommended that his contract not be renewed. Later that month the plaintiff was given written notice that he was not being rehired for the next year. The plaintiff sued the school corporation claiming it had not followed its own rules concerning the non-renewal of his contract.

The plaintiff argued that the Teacher Tenure Act provides for automatic renewal of non-tenured teachers unless written notice is given by the first of May.[71] The plaintiff also argued that the school corporation had made a rule under the General Powers Act,[72] which gave a teacher in its employ:

> [The] right to be warned in case his work is not satisfactory or up to expectations. The teacher will have a reasonable probationary period to correct the situation. The warning should deal with specific items and state consequences if improvement does not follow. This warning should be in writing for the record so that there can be no misquotation or later misunderstanding.[73]

The regulation also stressed the obligation of the school corporation to help teachers by providing close supervision and frequent visits and conferences during the probationary period. The school corporation did not dispute that the plaintiff had been afforded no written warning, probationary period, or assistance as the school corporation's rules required.[74]

The court, citing *School City of Lafayette v. Highley*,[75] held that the purpose of the Tenure Act was:

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[70]IND. CODE § 20-6-13-1 (1971) (currently codified at IND. CODE § 20-6.1-4-11 (Supp. 1980)).

[71]IND. CODE § 20-6-13-1 (1971) (currently codified at IND. CODE § 20-6.1-4-11 (Supp. 1980)).

[72]IND. CODE §§ 20-5-2-1 to -3 (1971) (currently codified at IND. CODE §§ 20-5-2-1 to -5 (1976 & Supp. 1980)). In particular, IND. CODE § 20-5-2-2(17) (1971) (currently codified at IND. CODE § 20-5-5-2(17) (Supp. 1980)) provided that a school corporation shall have the power

> [t]o prepare, make enforce, amend and/or repeal rules, regulations and procedures for the government and management of the schools, property, facilities and activities of the school corporation, its agents, employees and pupils and for the operation of its governing body, which rules, regulations, and procedures may be designated by any appropriate title such as "policy handbook," "by laws," "rules and regulations."

[73]398 N.E.2d at 1360.

[74]*Id.*

[75]213 Ind. 369, 12 N.E.2d 927 (1938).

> [t]o protect the educational interest of the state by the establishment of a uniform system of permanent contracts. It is not its purpose to foster the interests of, or to create special privileges to, any teacher or class of teachers. The policy of the law is to establish a uniform tenure system for all the schools of the state, and must be construed liberally with that aim and end in view.[76]

In addition, the court of appeals noted that the General Powers Act, which authorized the promulgation of regulations, also provided that the "discharge of teachers shall, however, be subject to and governed by the laws relating to employment . . . and discharge of teachers."[77] The court concluded that the school corporation rule which established a condition precedent to the non-renewal of a teacher's contract at the end of the term was contrary to the statutory scheme. Thus, the school corporation's regulation was void; therefore, the school corporation was not required to follow its own regulation. Accordingly, the court sustained the non-renewal of the plaintiff's contract.

The Tenure Act applied in *Brown* was subsequently repealed.[78] Under the current law, the Teacher Contract Act,[79] teachers who are under contract in a public school corporation for two consecutive years and then contract for future services to be rendered to the school corporation are "semipermanent teachers."[80] Those serving five or more consecutive years are "permanent teachers."[81] Permanent and semipermanent teachers are entitled to indefinite contracts which can be cancelled only for specifically authorized reasons.[82] Furthermore, specific procedures, such as providing the teacher with written notice, must be followed before cancellation. The teacher has the right to request a hearing at which he is given a full statement of the reasons for

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[76]398 N.E.2d at 1361 (citing School City of Lafayette v. Highley, 213 Ind. at 376-77, 12 N.E.2d at 930).

[77]IND. CODE § 20-5-2-2(7) (1976) (currently codified at IND. CODE § 20-5-2-2(7) (Supp. 1980)).

[78]IND. CODE § 20-6-12-1 (1971) was repealed by Act of Feb. 18, 1976, Pub. L. No. 100, § 4, 1976 Ind. Acts 409.

[79]IND. CODE §§ 20-6.1-4-1 to -20 (1976 & Supp. 1980).

[80]*Id.* § 20-6.1-4-9.5 (Supp. 1980).

[81]*Id.* § 20-6.1-4-9.

[82]*Id.* § 20-6.1-1-10 (1976) provides that an indefinite contract with a permanent teacher may be cancelled for immorality, insubordination, neglect of duty, incompetence, a justifiable decrease in the number of teaching positions or "other good and just cause." *Id.* § 20-6.1-4-10.5 (Supp. 1980) provides that an indefinite contract with a semi-permanent teacher may be cancelled for immorality, insubordination, neglect of duty, substantial inability to perform teaching duties, justifiable decrease in the number of teaching positions, good and just cause, or if in the best interest of the school corporation.

cancellation and an opportunity to present testimony and other evidence on his behalf.[83] Therefore, the means of removing a teacher by simply not renewing his or her contract at the end of a term is no longer available for those who have taught at least two consecutive years.

Brown remains significant because it raises the question of the relationship of the Teacher Contract Act,[84] the School Powers Act[85] and the Teacher Bargaining Act.[86]

The relationship of the Teacher Contract Act and the Teacher Bargaining Act may be better understood after an examination of *Reidenbach v. Board of School Trustees.*[87] In *Reidenbach*, a teacher brought an action against a school corporation for the alleged wrongful refusal to renew his teaching contract. In February, 1975, the school board terminated Reidenbach's contract. In April, 1975, the parties agreed to arbitrate Reidenbach's discharge. Nonetheless, six days after the agreement, the school board notified Reidenbach that his contract would not be renewed for the 1975-76 school year regardless of the outcome of the arbitration. Thereafter, the arbitrator found the school board's reasons for terminating Reidenbach were arbitrary and capricious and awarded him the balance of his 1974-75 salary.[88]

Nevertheless, the trial court found that Reidenbach had failed to exhaust his administrative remedies by failing to request the written reasons for the non-renewal of his contract as required by the collective bargaining agreement, and refused to enforce the arbitrator's decision. The court of appeals agreed with the trial court and rejected Reidenbach's contention that exhaustion of those remedies would have been futile because he already knew the school board's position on the issue. The court concluded that it would not assume that the reasons for Reidenbach's non-renewal were the same as the reasons for his wrongful discharge. Thus, it would have been premature for a court to consider the matter.[89]

The court's decision on the merits seems weak. The school board had discharged Reidenbach and had put him on notice that regardless of the outcome of the arbitration his contract would not be renewed. Reidenbach won the arbitration case, but the school board

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[83]*Id.* § 20-6.1-4-11 (Supp. 1980).

[84]*Id.* §§ 20-6.1-4-1 to -20 (1976 & Supp. 1980).

[85]*Id.* §§ 20-5-1 to -54.

[86]*Id.* §§ 20-7.5-1-1 to -14.

[87]398 N.E.2d 1372 (Ind. Ct. App. 1980).

[88]The collective bargaining agreement between the parties provided that the reasons for the nonrenewal of a teacher's contract "shall not be arbitrary or capricious." *Id.* at 1373.

[89]*Id.* at 1374.

adhered to its prearbitration position. It seems highly unlikely that the school board would have reconsidered its decision not to renew Reidenbach's contract even if he had requested the reasons for his non-renewal. The request would clearly have been futile.

Nevertheless, the court rejected Reidenbach's argument. The court buttressed its position by stating that such a request would have made a record of the school board's actions which could be reviewed by the trial court.[90]

The court apparently erroneously analogized the school board's actions to the quasi judicial actions of an administrative agency which are only subject to review on the administrative record. However, the school board was not acting as an independent administrative agency reviewing the action of an unrelated employer. Rather, it was the employer. The trial court's function should have been to hear the case de novo and determine if the school board employer had wrongfully refused to renew Reidenbach's contract. In the absence of a full record, the trial court could have admitted any "evidence" the school board wished to present regarding its reasons for not renewing Reidenbach's contract. The court of appeals, therefore, totally misapplied the doctrine of exhaustion of administrative remedies by requiring Reidenbach to request the reasons for his non-renewal.

Viewing *Brown*,[91] *Evansville-Vanderburgh*,[92] and *Reidenbach*[93] together, the complex interrelationship between the Teacher Contract Act,[94] the General Powers Act,[95] and the Teacher Bargaining Act[96] is illustrated. In *Evansville-Vanderburgh*, the Indiana Supreme Court held that a teacher evaluation plan was a discussable subject under the Teacher Bargaining Act. The court reasoned that the implementation of such a plan could result in a recommendation for the change of a teacher's assignment or even dismissal. Furthermore, the factors considered under the plan significantly affected the daily activities of school teachers.

In *Brown*, the court held that the procedures of the Teacher Tenure Act governing the non-renewal of a teacher's contract could not be supplemented by a school corporation's regulations promulgated under the General Powers Act. In fact, the supplementation was declared void because it created a condition precedent to the non-renewal of a teacher's contract.

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[90] *Id.*

[91] 398 N.E.2d 1359 (Ind. Ct. App. 1980).

[92] 395 N.E.2d 291 (Ind. Ct. App. 1979).

[93] 398 N.E.2d 1372 (Ind. Ct. App. 1980).

[94] IND. CODE §§ 20-6.1-4-1 to -20 (1976 & Supp. 1980).

[95] *Id.* §§ 20-5-1 to -60.

[96] *Id.* §§ 20-7.5-1-1 to -14.

In *Reidenbach*, a school board and the teachers' exclusive representative had negotiated procedural safeguards which had to be followed before the non-renewal of a teacher's contract. The court held that such procedures had to be exhausted before relief was sought from the courts.

These cases do not mesh well. If *Brown* is correct, it would appear that the former Teacher Tenure Act or the current Teacher Contract Act sets forth the sole procedures available to challenge the failure to renew a teacher contract. Even additional safeguards would be void.

How would *Evansville-Vanderburgh* affect the discussion of procedural safeguards for the non-renewal of teacher contracts? A teacher evaluation plan would appear to be a procedural safeguard assuring that the best teachers are retained and that evidence is collected fairly to determine which teachers should be terminated. In this sense, it guards against arbitrary non-renewal of teachers' contracts. Under *Evansville-Vanderburgh*, a teacher evaluation plan is a discussable topic under the Teacher Bargaining Act. Yet, if no safeguards can supplement those in the Teacher Contract Act, no purpose is served by discussing these issues.

If *Brown* is correct, then *Reidenbach* cannot be. The court in *Brown* held that safeguards negotiated by the teacher representative to prevent arbitrary non-renewal of teachers contracts are void. If the *Brown* holding was applied to the facts of *Reidenbach*, Reidenbach should not have been precluded from seeking court review merely because he failed to exhaust remedies which, in fact, were void under *Brown*.

The interrelationship of the three acts has not been clearly determined in any of these cases. However, a resolution of this interrelationship is essential to consistent and reasonable interpretation of all of these acts. Initially, it seems reasonable to suggest that the Teacher Contract Act should be construed to define the minimum procedures which cannot be waived for teacher contract renewal. The Teacher Bargaining Act should provide the parties the opportunity to supplement, but not defeat, the procedures of the Teacher Contract Act. Finally, the General Powers Act should permit a school corporation to effectuate supplemental procedures after it has fulfilled its responsibility to discuss them with the teachers' exclusive representative. Whether the acts will be so construed is up to the courts to decide.

XIII. Professional Responsibility and Liability

DONALD L. JACKSON*

A. Professional Responsibility

1. Enforcement of the Code.—a. Jurisdiction of the supreme court in disciplinary matters.—During the survey period, the Indiana Supreme Court in *In re Kesler*[1] reaffirmed the nature of its jurisdiction in disciplinary proceedings. In particular, the court held that article 7, section 4 of the Indiana Constitution vested with Indiana Supreme Court "exclusive jurisdiction in matters involving the admission and discipline of attorneys."[2]

The court in *Kesler* also distinguished between its authority in disciplinary matters and the authority of other courts to act in "criminal or civil matters out of which allegations of misconduct may arise."[3] Kesler argued that the allegations of professional misconduct against him had been the subject matter of an earlier proceeding before the Vigo Circuit Court; consequently, relitigation of these allegations was precluded by the doctrines of res judicata and estoppel by judgment. Rejecting this argument, the court indicated that criminal or civil matters may be adjudicated by trial courts, but only the supreme court may pass on matters "embracing professional misconduct."[4]

In *McQueen v. State*,[5] the supreme court was faced with the question of whether a trial court had the authority to suspend an attorney from the practice of law in the trial court. McQueen was the defense attorney in the criminal prosecution of Alan Dale Hicks. After the jury convicted Hicks, Shelby Superior Court Judge Tolen allegedly made a comment "to the effect that people, such as defendant, who are hooked on drugs, are not in fact human beings because

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The author wishes to express his appreciation to Robert D. MacGill for his assistance in the preparation of this Article.

[1]397 N.E.2d 574 (Ind. 1979), *cert. denied*, 49 U.S.L.W. 3246 (1980).

[2]397 N.E.2d at 575. IND. CONST. art. 7, § 4, provides in pertinent part:

> The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction.

[3]397 N.E.2d at 575.

[4]*Id.* at 576.

[5]396 N.E.2d 903 (Ind. 1979).

they don't function as human beings."[6] McQueen subsequently filed a motion for change of venue asserting that Judge Tolen should not sentence Hicks due to his bias and prejudice against Hicks. To support his motion, McQueen filed the affidavits of six jurors which set out their understanding of Judge Tolen's remarks. During the hearing on his motion for change of venue, McQueen supported the allegations of Judge Tolen's bias and prejudice by testimony of the prosecutor, the defendant, a deputy sheriff, and a local attorney.

After hearing this evidence, Judge Tolen ruled that McQueen had intentionally misrepresented the court's remarks and suspended McQueen from practicing law in his court for ninety days. McQueen appealed to the supreme court asking it to vacate his suspension by Judge Tolen.

The supreme court began its analysis of McQueen's appeal by presenting an historical view of the power of Indiana trial courts to suspend attorneys from the practice of law. The court noted that a statute in effect in the late 1800's[7] empowered "any court of record" to suspend an attorney from the practice of law. However, the court noted a steady erosion of the disciplinary powers of trial courts that began with a 1931 act of the Indiana legislature[8] that conferred upon the supreme court the exclusive jurisdiction to admit attorneys to practice law in all state courts. The court did observe, however, that this amendment did not affect the trial courts' concurrent jurisdiction with the supreme court "to discipline the members of *its own* bar and those practicing before it."[9] The court concluded its historical sketch by noting that the supreme court currently has exclusive jurisdiction in actions to discipline members of the Indiana bar by virtue of the 1970 amendment to article 7, section 4 of the Indiana Constitution[10] and the adoption of Disciplinary Rule 23.[11]

The court concluded that under current Indiana law the suspension of McQueen was an *ultra vires* act by the trial court due to "the clear language of Article 7, § 4 of the Indiana Constitution and the implementing rules adopted thereunder."[12] However, the court was careful to point out that a trial court is still empowered to punish

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[6]*Id.*

[7]2 G. & H. § DCCLXXVII, p. 329 (1870) (J. GAVIN & O. HORD, STATUTES OF INDIANA (1870)).

[8]IND. CODE ANN. § 4-3605 (Burns 1933).

[9]396 N.E.2d at 904 (quoting Beamer v. Waddell, 221 Ind. 232, 240, 45 N.E.2d 1020, 1022 (1943)) (emphasis added by *McQueen* court).

[10]*See* note 1 *supra.*

[11]The current version of IND. R. ADMISS. & DISCP. 23(1) provides: "This Court has exclusive jurisdiction of all cases in which an attorney who is admitted to the bar of this Court or who practices law in this State . . . is charged with misconduct."

[12]396 N.E.2d at 906.

the misconduct of attorneys to protect itself "against insult and gross violations of decorum by the infliction of summary punishment by fine, imprisonment or both via a contempt citation."[13] The court clarified its position by stating that the suspension of an attorney from the practice of law may not be imposed by the trial court as punishment for contempt.[14]

However, this decision was not a unanimous one. Justice Pivarnik, with whom Chief Justice Givan joined, concurred in only the result of the majority. Justice Pivarnik took a different view of the historical developments relating to a trial court's power to suspend attorneys from the practice of law. He viewed the recent amendment to Indiana's constitution[15] and the implementing rule thereunder[16] as providing that the supreme court should have "original and exclusive jurisdiction to discipline, suspend and disbar attorneys *from the practice of law.*"[17] He coupled this interpretation with what he regarded as a long-standing Indiana rule that a trial judge may exercise his "sound legal discretion" to insure the orderly procedure of the trial court.[18] Justice Pivarnik's opinion distinguishes between the power to suspend an attorney from the practice of law and the power to suspend an attorney from the practice of law in a particular court. Justice Pivarnik concluded that the power to suspend an attorney from a *particular court* should be within the trial judge's "sound legal discretion" and should be exercised when an attorney "violate[s] accepted standards of decency, decorum and ethics."[19] Adoption of Justice Pivarnik's distinction, however, could cause differing disciplinary standards and sanctions to develop in the various counties throughout the state.

b. Constitutional challenges to enforcement of the Code.—In several disciplinary proceedings during the survey period, the respondents argued that certain constitutional doctrines protected their circumspect conduct from disciplinary action. These arguments met with little success.

In *In re Terry*,[20] Terry was charged, *inter alia*, with knowingly making an untrue statement about a judge in violation of Disciplinary Rule [hereinafter referred to as DR] 8-102(B) of the

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[13]*Id.* at 904.

[14]*Id.* at 906.

[15]IND. CONST. art. 7, § 4.

[16]IND. R. ADMISS. & DISCP. 23(1).

[17]396 N.E.2d at 907 (Pivarnik, J., concurring) (emphasis added).

[18]*Id.* at 906. In support of this proposition, Justice Pivarnik cited State *ex rel.* Rooney v. Lake Circuit Court, 236 Ind. 345, 140 N.E.2d 217 (1957); Brown v. Brown, 4 Ind. 627 (1853).

[19]396 N.E.2d at 907.

[20]394 N.E.2d 94 (Ind. 1979), *cert. denied*, 100 S. Ct. 1025 (1980).

Code of Professional Responsibility.[21] Terry argued that such statements were protected under the first amendment and "that the cases sounding in libel and slander are persuasive and instructive in determining the standard of misconduct to be applied."[22]

The Indiana Supreme Court did not agree with Terry's contentions. The court distinguished professional misconduct from defamation on the basis of "[t]he societal interests protected by these two bodies of law"[23]: professional misconduct is a wrong against society while defamation constitutes a wrong against an individual.[24]

The court concluded that conduct such as Terry's "does nothing but weaken and erode the public's confidence in an impartial adjudicatory process."[25] Therefore, the court found that such conduct by Terry violated the Code of Professional Responsibility despite Terry's argument for first amendment protection.[26]

The supreme court was faced with another first amendment defense in *In re Perrello*.[27] Perrello was charged with violating the Code of Professional Responsibility by soliciting clients, giving unsolicited advice to laymen to retain counsel, suggesting himself as counsel, and accepting employment from the solicited laymen.

The supreme court more directly addressed the first amendment claim in *Perrello* than it did in *Terry*. The court held that the rules which prohibit the conduct in which the respondent engaged "protect and serve legitimate public interests by penalizing undue influence, overreaching, and misrepresentations."[28] The court in *Perrello* did not cite either of two prior United States Supreme Court decisions[29] dealing with solicitation and first amendment protection. In one of these cases,[30] the respondent made first amendment claims strikingly similar to those made by Perrello.

Perrello also challenged certain sections[31] of the Code of Professional Responsibility as being unconstitutionally vague because they

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[21]1980 IND. CT. R. 341. The Code contains the conduct-regulative Disciplinary Rules [hereinafter referred to as DRs], which establish the minimum professional standards below which no attorney may fall.

[22]394 N.E.2d at 95.

[23]*Id.*

[24]*Id.*

[25]*Id.* at 96.

[26]*Id.*

[27]394 N.E.2d 127 (Ind. 1979).

[28]*Id.* at 130-31.

[29]Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978); In re Primus, 436 U.S. 412 (1978).

[30]Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978). The United States Supreme Court found that Ohralik's in-person solicitation was not protected by the first amendment. *Id.* at 468.

[31]DRs 2-103(A), -104(A).

failed "to set a clear line of demarcation between permitted and proscribed speech."[32] The court rejected this due process challenge and held the rules were not overbroad or vague because they are "commonly understood by reasonable men and particularly by attorneys."[33]

The supreme court was faced with another due process challenge in *In re Kesler*.[34] Kesler claimed that a violation of the due process clause occurred because he was not given an opportunity to appear before the Disciplinary Commission before it decided to file a complaint against him.[35] The court, however, found no due process violation because Kesler failed to show that he was prejudiced by the lack of a hearing before the Disciplinary Commission filed its complaint. Furthermore, Admission and Discipline Rule 23 provides for a later hearing before a hearing judge in which the respondent can confront those making allegations against him.[36]

Kesler also argued that he was placed in double jeopardy by the prosecution of the Disciplinary Commission's complaint. The foundation of this argument was the trial court's previous dismissal of objections brought to an estate's final report prepared by Kesler. Kesler reasoned that the disciplinary proceeding against him placed him in jeopardy for a second time since the trial court had previously dismissed objections to the final report. The supreme court rejected this argument. The court held that double jeopardy is a constitutional doctrine applicable only in criminal proceedings and that proceedings under Admission and Discipline Rule 23 are not criminal in nature.[37]

c. Specific violations of the Code.—In 1976, the Indiana Supreme Court made the following declaration of policy:

> Until recently, the enforcement of professional ethics has been lax, and doubtlessly many lawyers have been lulled into a sense of false security, believing that one's own conscience and good intentions are sufficient guides for the conduct of his professional affairs. We are determined to improve the public image of the legal profession in this state through the rigorous enforcement of the Code of Professional Responsibility adopted in 1971.[38]

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[32]394 N.E.2d at 130.

[33]*Id.* at 131.

[34]397 N.E.2d 574 (Ind. 1979), *cert. denied*, 49 U.S.L.W. 3246 (1980).

[35]397 N.E.2d at 576.

[36]*Id.*

[37]*Id.* at 575-76.

[38]*In re* Fuchs, 264 Ind. 173, 176, 340 N.E.2d 762, 764 (1976).

Since this declaration, enforcement of the Code has become less lax. The survey period covered by this article was no exception. In published opinions during the survey period, the supreme court disbarred five attorneys, suspended three attorneys, reinstated one attorney, and gave two public reprimands. Additionally, the Disciplinary Commission had fifty-nine pending cases in which verified complaints had been filed with the clerk of the supreme court as of July 25, 1980.[39]

(i) Conduct warranting disbarment.—In *In re Kesler*,[40] the evidence showed that Kesler commingled partial distributions from the estate of Elsie M. Grammer with his own funds and made no accounting of the funds to either the estate's primary beneficiary or the estate.[41] The Disciplinary Commission filed a verified complaint in which Kesler was charged with failing to preserve the identity of his client's funds[42] and with "filing and swearing to a false and misleading 'Petition for Partial Distribution.' "[43] The court concluded that Kesler had engaged in the unprofessional and unethical conduct alleged in the Disciplinary Commission's complaint.[44]

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[39]The pending cases were summarized by the Disciplinary Commission as follows:

CATEGORY OF	NUMBER CASES
Neglect	17
Conflict of Interest	11
Trial Conduct	6
Solicitation and Trade Names	1
Out-of-Court Statements	5
Criminal Misconduct	—
Conversion of Client's Assets	1
Other Crimes (Including tax, bribery, drugs, morals, fraud, and illegal payoff)	12
Disability Hearing	1
Reinstatement Hearing	3
Unauthorized Practice of Law	2
TOTAL CASES	59

[40]397 N.E.2d 574 (Ind. 1979), *cert. denied*, 49 U.S.L.W. 3246 (1980).

[41]397 N.E.2d at 579.

[42]*Id.* at 577. Such conduct is a violation of DR 9-102(A) which provides in part: All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein . . . .

[43]397 N.E.2d at 577. Such conduct is a violation of DR 1-102(A)(4) and DR 1-102(A)(6) which provide: "A lawyer shall not: . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. . . . (6) Engage in any other conduct that adversely reflects on his fitness to practice law."

[44]397 N.E.2d at 579.

The court made several important observations about how it determined the appropriate disciplinary sanction. After the court acknowledged that it had heard the testimony of several citizens and members of the bar concerning Kesler's past accomplishments, it noted that "past performance and accomplishments cannot, by themselves, determine the sanction to be imposed."[45] Additionally, the court stated: "The interests protected by enforcement of professional conduct are much greater and extend to broad social concerns. This Court must weigh these broader considerations as well as the impact discipline will have on an individual."[46]

The court analyzed the circumstances of the case and concluded that the commingling of funds by Kesler was not a case involving poor accounting practices; instead, the case involved a course of conduct in which Kesler tried to secure an advantage at his client's expense. This conduct struck the court as illustrating "a shocking lack of understanding of the fiduciary responsibilities placed on all the members of the Bar of this State."[47] As a result, the court ordered that Kesler be disbarred.[48]

In re Castello also involved the improper handling of the funds of an estate.[49] The supreme court found that Castello "failed to keep his clients' funds in separate identifiable bank accounts . . . ; identify, label and protect property belonging to clients . . . ; maintain records or to render an appropriate accounting of such funds . . . ; [and] promptly pay and deliver such funds to his clients" in violation of DR 9-102.[50] As a result of the findings, the court held that Castello had engaged in dishonest and deceitful conduct which was "prejudicial to the administration of justice" and which called into question his fitness as an attorney.[51]

The hearing officer in *Castello* concluded that Castello's misconduct resulted from his lack of familiarlity with accounting procedures and disciplinary rules. However, the supreme court held that "[s]tate of mind, lack of skills or lack of understanding of the disciplinary rules cannot be considered as a defense of misconduct."[52]

Castello asked the court to limit any suspension imposed upon him in a manner that would allow him to continue to serve as an administrative hearing officer. However, the court held that ethical

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[45]*Id.*
[46]*Id.*
[47]*Id.* at 579-80.
[48]*Id.* at 580.
[49]402 N.E.2d 970 (Ind. 1980).
[50]*Id.* at 972.
[51]*Id.*
[52]*Id.*

standards apply equally to all attorneys, regardless of their form of professional employment.[53] The court concluded its opinion by disbarring Castello.[54]

In re Perrello[55] involved the supreme court's review of the respondent's practice of approaching strangers in the hallways surrounding Marion County's municipal courts and offering them unsolicited legal advice and then offering to serve as their attorney. The court found that this conduct violated the Code of Professional Responsibility.[56]

Additionally, the court found that Perrello "engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation."[57] Such conduct was held by the court to adversely reflect on his fitness to practice law.[58] This fraudulent and deceitful conduct occurred when Perrello was trying to gain reinstatement to the Indiana bar after he had been suspended for a two-year period which began in 1973.[59] Perrello stated during a hearing on his second petition for reinstatement from the 1973 suspension that his practice of unethically soliciting clients was "injurious to the public and bar, and that he would never engage in such conduct if reinstated to the practice of law."[60] The court reinstated Perrello on March 16, 1977.[61] After his reinstatement, Perrello engaged in the same conduct that gave rise to his original two-year suspension. This caused the court to regard the representations Perrello gave during the hearings on his reinstatement petition as deliberate misrepresentations "designed to gain readmission to the practice of law."[62] In light of Perrello's previous suspension for the same conduct, the court concluded that only disbarment could effectively protect the "unsuspecting public from such highly unethical behavior."[63]

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[53]*Id.* at 973.

[54]*Id.*

[55]394 N.E.2d 127 (Ind. 1979).

[56]*Id.* at 131. The Respondent was charged with violating DR 2-103(A) and DR 2-104(A). DR 2-103(A) provides: "A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer." DR 2-104(A), with certain exceptions, generally prohibits a lawyer from accepting employment from one to whom he had given the unsolicited advice to obtain counsel.

[57]394 N.E.2d at 132.

[58]*Id.*

[59]*In re* Perrello, 260 Ind. 254, 295 N.E.2d 357 (1973). Perrello's suspension in 1973 was imposed for the same type of conduct that was the subject of the 1979 disciplinary proceedings against him.

[60]394 N.E.2d at 131.

[61]*Id.* at 132.

[62]*Id.*

[63]*Id.*

In *In re Terry*,[64] a former judge of the Ripley Circuit Court, Terry, was disbarred. Initially, the supreme court had suspended Terry without pay as Judge of Ripley Circuit Court.[65] Subsequently, the court found that Terry had, subsequent to his suspension, sent correspondence to public officials which alleged that Justice Hunter had conspired with others to cover up the criminal activity of a certain individual. Moreover, Terry alleged in such correspondence that this "cover up" was the motivation behind his suspension. The court found that Terry's allegations were made without any basis.[66] On the basis of these findings the court concluded that Terry had violated his oath as an attorney, had knowingly made a false statement against a judge, and had engaged in conduct which adversely reflected on his ability to practice law.[67]

Additionally, the court was presented with evidence that Terry had given a packet of documents to prospective grand jurors in Ripley Circuit Court. Included in this packet of documents was a letter signed by Terry which alleged that a Ripley County attorney was involved in criminal activity and that the judge pro tempore of the Ripley Circuit Court and the prosecutor had covered up this criminal activity. The court held that these acts by Terry "constituted communication with a person known to be a member of the venire from which a jury was to be selected and conduct prejudicial to the administration of justice adversely reflecting on the Respondent's [Terry's] fitness to practice law."[68]

In disbarring Terry, the court seemed to focus on the fact that Terry's conduct "seriously challenged the integrity of the court system and its officers."[69] In addition, the court noted that Terry's conduct demonstrated "that he [didn't] deserve the respect of his profession and . . . that he [was] not capable of meeting the ethical restraints placed on all members of the Bar."[70]

In re Weaver[71] involved the supreme court's disbarment of an attorney on the basis of his disbarment in Florida. Weaver was disbarred in Florida due to his failure to comport with that state's professional standards. The report given by the referee appointed by the Florida Supreme Court served as the basis of the Indiana Supreme Court's finding that Weaver had engaged in conduct in-

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[64]394 N.E.2d 94 (Ind. 1979), *cert. denied*, 100 S. Ct. 1025 (1980).

[65]*In re* Terry, 262 Ind. 667, 323 N.E.2d 192 (1975), *cert. denied*, 423 U.S. 867 (1975).

[66]394 N.E.2d at 95.

[67]*Id.* at 95, 96. Such conduct was held to violate DRs 1-102(A)(1) & (6) and 8-102(B).

[68]394 N.E.2d at 96. Such conduct was held to violate DRs 1-102(A)(1), (5) & (6) and 7-108(A).

[69]394 N.E.2d at 96.

[70]*Id.*

[71]399 N.E.2d 748 (Ind. 1980).

volving dishonesty and moral turpitude, failed to return a client's funds, neglected legal matters entrusted to him, refused to carry out his contract of employment, engaged in the unauthorized practice of law, prejudiced his client, and engaged in conduct reflecting adversely on his ability to practice law.[72]

The Indiana Supreme Court held that Weaver's conduct also violated Indiana's Code of Professional Responsibility.[73] In assessing the appropriate sanction, the court considered the misconduct which caused Weaver's disbarment in Florida and concluded that he "flagrantly abused the trust of his clients, and disregarded his professional obligations."[74] The court ordered Weaver's disbarment.[75]

(ii) Conduct Warranting Suspension.—In *In re Neal*,[76] Neal and the Disciplinary Commission submitted a joint stipulation of facts to the supreme court in which Neal admitted that he had informed an employee of Delaware County's Superior Court that the judge had authorized the civil docket to be backdated in order to reflect a timely filing of a praecipe. Such an authorization had not, in fact, been given. Subsequently, Neal was charged "with engaging in conduct involving dishonesty, fraud, and misrepresentation . . . , with engaging in conduct prejudicial to the administration of justice adversely reflecting on [his] fitness to practice law . . . , and with circumventing the . . . Disciplinary Rules through the actions of another."[77]

The supreme court concluded that the stipulations of fact submitted by the parties established that Neal "intentionally attempted to perpetrate a fraud upon the Delaware Superior Court."[78] Consequently, the court held that Neal was guilty of each Code violation with which he was charged.[79]

The court regarded as mitigating circumstances the facts that Neal seemed remorseful about his conduct, that he voluntarily

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[72]*Id.* at 751.

[73]*Id.* The court made this holding after stating, "Disbarment in another state can be the basis for disbarment proceedings in Indiana." *Id.* at 750. In support of this statement the court cited Nolan v. Brawley, 251 Ind. 697, 244 N.E.2d 918 (1969) and IND. R. ADMISS. & DISCP. 23(2)(b), which provides:

> If an attorney admitted to practice in this State who is also admitted to practice in any other state should be disbarred or suspended by the proper authority of such other state, such disbarment or suspension shall constitute sufficient grounds for disbarment or suspension of said attorney in this State.

[74]399 N.E.2d at 751.

[75]*Id.*

[76]397 N.E.2d 967 (Ind. 1979).

[77]*Id.* at 967. Such conduct violates DRs 1-102(A)(2), (4)-(6).

[78]397 N.E.2d at 968.

[79]*Id. See* note 69 *supra.*

withdrew from the practice of law after this incident, and that this unethical conduct was an "isolated and solitary" incident which was occasioned by a "deep emotional disturbance" involving his personal life.[80] In light of these mitigating circumstances, the court suspended Neal from the practice of law for two years and credited him with the time that he had voluntarily withdrawn from the practice of law.[81]

In re Darby[82] also involved an attorney's misrepresentations to court employees. The supreme court found that Darby had made misrepresentations to courts in several Indiana counties. In particular, the court found that Darby avoided various court appearances over a period of fifteen months by "intentionally misrepresenting the status of his calendar."[83]

In assessing the magnitude of Darby's misconduct, the court stated:

> As demonstrated by the conduct present in this case, the effective, efficient administration of the judiciary forces judges and all parties to rely on the factual assertions of an attorney. In this day of crowded calendars, multiple settings, and complex, time-consuming pretrial procedures, the judicial system has little room for the participant whose word does not warrant the respect of his profession. A court simply must be able to rely on an attorney's representations; otherwise, it cannot function.[84]

The court noted that these misrepresentations involved a pattern of conduct rather than an isolated event.[85] As a result, the court suspended Darby from the practice of law for a period of not less than one year.

In re Craven[86] presented an interesting set of facts. Craven represented the plaintiff in a medical malpractice action. The case was set for trial on March 11, 1974. Craven instructed his secretary to prepare and file a motion for a continuance in the case. However, no such motion was filed with the court. Counsel for the defendants appeared on the morning of trial, but Craven did not. Consequently, the trial judge dismissed the prospective jurors and the cause of action.

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[80]397 N.E.2d at 968.
[81]*Id.* at 969.
[82]403 N.E.2d 1074 (Ind. 1980).
[83]*Id.* at 1077.
[84]*Id.*
[85]*Id.*
[86]390 N.E.2d 163 (Ind. 1979).

After Craven filed his motion to correct errors, he contacted his legal malpractice insurer. For several months Craven avoided any contact with the clients on whose behalf he brought the medical malpractice claim. In December of 1974, Craven informed his clients that their claim had been dismissed. However, he explained to them that he would contact the insurance carrier of one of the defendants and attempt to negotiate a $3,000 settlement. Craven at no time mentioned to his clients his contact with his own legal malpractice carrier.

On January 8, 1975, Craven's legal malpractice carrier issued a draft which was jointly payable to Craven's law firm and to his clients. Craven then met with his clients and informed them that the defendants had agreed to settle their medical malpractice claim for $3,000. Craven's clients accepted this payment, less Craven's attorney's fees, as the settlement for their medical malpractice action.

The supreme court held that Craven's conduct constituted neglect of a legal matter entrusted to him and involved dishonesty, deceit, and misrepresentation.[87] Additionally, the court held that Craven failed to disclose a flagrant conflict of interest and generally engaged in conduct which adversely reflected on his fitness to practice law.[88]

The court summarized the nature of Craven's misconduct in the following way:

> Throughout the entire course of events, at each crucial decision, the Respondent abandoned his ethical responsibilities and compounded his professional dilemma. The Respondent first neglected his clients, then represented these clients under circumstances wherein the Respondent's own personal and business interests were in direct and obvious conflict, and, lastly, misrepresented crucial and material facts to these individuals who had sought his professional services.[89]

The court continued by stating that the essence of an attorney-client relationship is trust and that conduct like Craven's "casts a negative impression upon the entire legal profession."[90] After castigating his conduct with this strong language, the court imposed upon Craven a suspension of not less than one year.

In re Riley[91] involved, *inter alia*, the respondent's failure to return fees to clients who paid in advance for legal services which

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[87] *Id.* at 167. Such conduct violates DRs 1-102(A)(4) & 6-101(A)(3).

[88] 390 N.E.2d at 167. Such conduct violates DRs 1-102(A)(1), (6) & 5-101(A).

[89] 390 N.E.2d at 167.

[90] *Id.*

[91] 73 Ind. Dec. 172 (Ind. 1979).

were never rendered. As a result, the supreme court suspended Riley, without automatic reinstatement, for ninety days.[92]

(iii) Offenses justifying public reprimands.—*In re Garrett*[93] involved Garrett's failure to prosecute an appeal from an administrative ruling after accepting a fee from his client for this purpose. Garrett's inaction resulted in the inability of his client to obtain a judicial review of the administrative process. Consequently, the court found Garrett "neglected a legal matter entrusted to him, engaged in conduct prejudicial to the administration of justice and engaged in conduct adversely reflecting on his fitness to practice law."[94]

For purposes of determining the appropriate sanction to be imposed, the court took judicial notice of a prior proceeding against the respondent[95] which resulted in his suspension from the practice of law for a period of one year. The court also noted that the misconduct found in the current case was similar in nature and in time of occurrence to that involved in the prior proceeding.[96] The court reasoned that Garrett had not petitioned for reinstatement from his prior suspension at the time of the current opinion due to the pendancy of the current complaint.

The court stated that Garrett's suspension had, in effect, been extended due to the prosecution of this complaint.[97] Due to this special circumstance, the court decided that no further suspension was warranted. The court reprimanded and admonished Garrett.[98]

The court also issued a public reprimand in *In re Fisher.*[99] The reprimand was issued to a deputy prosecutor who had accepted private employment from a client involved in several legal proceedings in the same county. The court held that this violated the Code[100] because Fisher had "accepted private employment in a matter in which he had substantial responsibility."[101]

d. Discretion on sanctions.—Perhaps the most uncertain aspect of a disciplinary proceeding is gauging the type of discipline that

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[92]*Id.* at 173. It should be noted that Riley was reinstated by the supreme court on April 11, 1980. However, Justice Hunter dissented to his reinstatement by stating that Riley failed to establish by clear and convincing evidence that he was eligible for complete reinstatement. *In re* Riley, 402 N.E.2d 975 (Ind. 1980).

[93]399 N.E.2d 369 (Ind. 1980).

[94]*Id.* at 370. Such conduct violated DRs 1-102(A)(5), (6) & 6-101(A)(3).

[95]*In re* Garrett, 377 N.E.2d 1368 (Ind. 1978).

[96]399 N.E.2d at 370.

[97]*Id.*

[98]*Id.*

[99]400 N.E.2d 1127 (Ind. 1980).

[100]This conduct constituted a violation of DR 9-101(B).

[101]400 N.E.2d at 1127.

will be imposed. The supreme court has broad discretion as to the type of discipline it may impose upon an attorney found guilty of misconduct.[102] However, the cases decided during the survey period provide helpful guidance to the practitioner who needs to assess the type of sanction that is likely to be imposed.

When considered with other recently decided cases,[103] the supreme court's opinions in *Kesler*[104] and *Perrello*[105] seem to suggest that the supreme court's primary interest in enforcing the Code of Professional Responsibility is to protect the public from unscrupulous attorneys. Each of the recent opinions addressing serious violations of the Code have carefully weighed this interest when determining the appropriate sanction to impose.

Other factors that the supreme court will consider in assessing the appropriate sanction were revealed in cases decided during the survey period. One of these factors is the impact the punishment will have on the disciplined attorney.[106] The court also held that past performances and accomplishments of the attorney will be considered.[107]

The court will also consider the nature of the misconduct in assessing which sanction is necessary to protect the public. The court's consideration of the nature of the misconduct is demonstrated by contrasting the sanction imposed in *Terry*[108] with that imposed in *Darby*.[109] Both cases involved an attorney's lack of respect for the integrity of the court system. In *Darby*, the court found that Darby had intentionally made misrepresentations to the court regarding the status of his calendar. The court concluded that the judicial system cannot function if the representations of attorneys cannot be relied upon. The court suspended Darby for a period not less than one year.[110] The court felt it was faced with a more serious challenge to the integrity of the judicial system in *Terry*. Terry was found to have made false allegations that Justice Hunter had tried to "cover up" the criminal activity of a certain individual by suspending Terry from his job as Judge of the Ripley

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[102]IND. R. ADMISS. & DISCP. 23(3).

[103]*In re* Vincent, 374 N.E.2d 40 (Ind. 1978); *In re* Tabak, 266 Ind. 271, 362 N.E.2d 475 (1977); *In re* Murray, 266 Ind. 221, 362 N.E.2d 128 (1977), *appeal dismissed*, 434 U.S. 1029 (1978); *See generally* Bubalo, *Professional Responsibility, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 325 (1980).

[104]397 N.E.2d 574 (Ind. 1979), *cert. denied*, 49 U.S.L.W. 3246 (1980).

[105]394 N.E.2d 127 (Ind. 1979).

[106]397 N.E.2d at 579.

[107]*Id.* The court will also consider previous disciplinary proceedings. *In re* Garrett, 399 N.E.2d 369 (Ind. 1980).

[108]394 N.E.2d 94 (Ind. 1979), *cert. denied*, 100 S. Ct. 1025 (1980).

[109]403 N.E.2d 1074 (Ind. 1980).

[110]*Id.* at 1077.

Circuit Court.[111] The court concluded that this serious challenge to the integrity of the judicial system warranted disbarring Terry.[112]

During the survey period, the court revealed a factor that it would not consider in assessing which sanction to impose. The form of an attorney's employment will not be considered in determining the appropriate sanction.[113]

The court also delineated circumstances which mitigate the need for severe discipline. These circumstances include the attorney's remorseful feelings about the misconduct and voluntary withdrawal from the practice of law.[114] Additionally, findings that the misconduct was occasioned by a "deep emotional disturbance" or that it was an "isolated and solitary incident" will serve to mitigate the sanction imposed.[115]

Predicting the severity of the sanction that the court will impose in a disciplinary proceeding will continue to be a difficult task. However, the court's recent decisions have set forth important guideposts for attorneys needing to ascertain the probable consequences of professional misconduct.

2. Claims of Incompetent Counsel.—During the survey period, several petitions for post conviction relief were filed which alleged that the denial of effective assistance of counsel had resulted in a violation of the sixth amendment to the United States Constitution.[116] In each of these cases, the court adhered to essentially the same standard of review summarized by the Indiana Supreme Court:

> When a defendant challenges the adequacy or competency of his trial counsel, he labors under a great burden. *Rector v. State*, (1976) 264 Ind. 78, 339 N.E.2d 551. As we have consistently held, there is a strong presumption that counsel has performed competently. To overcome this presumtion, appellant must show that what the attorney did or did not do made the proceedings a mockery of justice shocking to the conscience of the reviewing court.[117]

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[111]394 N.E.2d at 95.

[112]*Id.* at 96.

[113]*In re* Castello, 402 N.E.2d 970, 973 (Ind. 1980). *See* text accompanying notes 41-46 *supra.*

[114]*In re* Neal, 397 N.E.2d 967 (Ind. 1979).

[115]*Id.* at 968.

[116]Willis v. State, 401 N.E.2d 683 (Ind. 1980); Nelson v. State, 401 N.E.2d 666 (Ind. 1980); Moffett v. State, 401 N.E.2d 340 (Ind. 1980); Rector v. State, 389 N.E.2d 279 (Ind. 1980); Duncan v. State, 400 N.E.2d 1112 (Ind. 1980); Smith v. State, 396 N.E.2d 898 (Ind. 1979); Herman v. State, 395 N.E.2d 249 (Ind. 1979); Keys v. State, 390 N.E.2d 148 (Ind. 1979).

[117]Duncan v. State, 400 N.E.2d at 1113-14.

In *Rector v. State*,[118] the supreme court, noting that there is a presumption of competent counsel, held that abandoning a questionable issue on appeal does not reflect imcompetence of counsel.[119] "Isolated poor strategy, bad tactics, a mistake, carelessness, or inexperience does not necessarily amount to ineffective counsel unless, taken as a whole, the trial was a mockery of justice."[120]

Cases decided after *Rector* gave some general indications about what must be shown in order to prove one was denied the effective assistance of counsel.[121] In *Moffett v. State*, the court held that the petitioner must demonstrate by a preponderance of the evidence that "taken as a whole, assistance of counsel in the criminal proceeding amounted to a mockery of justice."[122] In *Duncan v. State*,[123] the supreme court reiterated an earlier holding[124] by stating that "[a] determination of counsel's adequacy can be made only on the facts and circumstances of each case."[125]

Other cases recently decided by the supreme court have helped define which circumstances may and may not be a denial of effective assistance of counsel.[126] The court in *Duncan* held that incidents at trial which may reflect a lack of experience in trying criminal cases will not support a finding of inadequate representation.[127] The incidents which allegedly reflected a lack of experience in *Duncan* included a request by defense counsel for the "seclusion of witnesses" instead of a request for the "separation of witnesses" and the questionable expertise of defense counsel on certain questions of evidence.[128] The court noted that the petitioner had failed to show any real prejudice due to these incidents.[129] Consequently, the court concluded that these isolated mistakes did not constitute inadequate representation because the trial was not reduced to a mockery of justice.[130] In *Nelson v. State*,[131] the supreme court noted that in determining whether the defendant's representation was adequate

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[118]389 N.E.2d 279 (Ind. 1979).

[119]*Id.* at 281.

[120]*Id.* (quoting Blackburn v. State, 260 Ind. 5, 22, 291 N.E.2d 686, 696 (1973)).

[121]*See* Moffett v. State, 401 N.E.2d 340 (Ind. 1980); Duncan v. State, 400 N.E.2d 1112 (Ind. 1980).

[122]401 N.E.2d 340 (Ind. 1980).

[123]400 N.E.2d 1112 (Ind. 1980).

[124]*See* Skinner v. State, 383 N.E.2d 307 (Ind. 1978).

[125]400 N.E.2d at 1114.

[126]*See* Nelson v. State, 401 N.E.2d 666 (Ind. 1980); Duncan v. State, 400 N.E.2d at 1112 (Ind. 1980); Rector v. State, 389 N.E.2d 279 (Ind. 1979).

[127]400 N.E.2d at 1114.

[128]*Id.*

[129]*Id.*

[130]*Id.* at 1115.

[131]401 N.E.2d 666 (Ind. 1980).

under the sixth amendment, it "will not second guess counsel's trial tactics or strategy."[132]

Other post-conviction relief petitions[133] argued that effective assistance of counsel had been denied because the co-defendants were represented by one attorney. Joint representation of co-defendants has been held not to be *per se* evidence of ineffective representation; therefore, the one seeking relief from a resulting conviction must demonstrate that actual prejudice resulted from the joint representations.[134]

In *George v. State*,[135] the court of appeals held that two of the four co-defendants who were represented by the same attorney had demonstrated actual prejudice.[136] The prejudice was found to stem from the defense attorney's inability to cross-examine one of his own clients. Testimony that the attorney might have elicited from this client could have exculpated two of his other clients, Mark Wilbur and Timothy George. Therefore, the court reversed the convictions of Wilbur and George and issued the caveat that representation of both Wilbur and George at the new trial might give rise to another prejudicial conflict of interest.[137]

In *Smith v. State*,[138] the supreme court again granted a new trial on the basis of Smith's contention that he was denied the effective assistance of counsel. Counsel in *Smith* had decided to have the defendant appear in civilian clothes, but the attendant deputy refused to accept the clothes counsel had sent to the defendant who was in jail. Consequently, the defendant appeared before the jury in jail uniform. Counsel in *Smith* did not object to his client's attire at trial because he believed the law gave the trial judge the discretion to determine the attire in which the defendant appear. This perception by Smith's counsel was incorrect. More than six months before the trial, the United States Supreme Court held in *Estelle v. Williams*[139] that requiring one to stand trial in jail clothes impairs the right to a fair trial and thus violates the fourteenth amendment's equal protection and due process clauses.[140]

The Indiana Supreme Court relied on the reasoning of Chief

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[132]*Id.* at 669.

[133]Riner v. State, 394 N.E.2d 140 (Ind. 1979); George v. State, 395 N.E.2d 263 (Ind. Ct. App. 1979).

[134]Riner v. State, 394 N.E.2d 140 (Ind. 1979). *Accord*, Stoehr v. State, 263 Ind. 208, 328 N.E.2d 422 (1975); Martin v. State, 262 Ind. 232, 314 N.E.2d 60 (1974).

[135]395 N.E.2d 263 (Ind. Ct. App. 1979).

[136]*Id.* at 267.

[137]*Id.*

[138]396 N.E.2d 898 (Ind. 1979).

[139]425 U.S. 501 (1976).

[140]*Id.* at 505-06.

Justice Burger in *Estelle* when it considered whether Smith's counsel had committed an error which caused the trial to be a "farce and mockery of justice."[141] The court pointed out that the magnitude of the prejudice that could have accrued to the defendant by way of his counsel's error was clearly summarized by Chief Justice Burger in his opinion in *Estelle*:

> "Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system . . . . This is a recognition that the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play."[142]

The Indiana Supreme Court concluded that Smith's appearance at trial in jail clothes "had a pervasive influence on the trial."[143] The court held that Smith had been denied the effective assistance of counsel required under the sixth amendment.[144] However, the court cautioned:

> We do not hold that every time a defendant appears at trial in jail garb and his attorney fails to object that defendant has been denied the effective assistance of counsel. However, where, as here, it can be shown that trial counsel is incapable of carrying out his trial strategy on so fundamental a point because of ignorance of the law, that attorney has been ineffective in his assistance of the defendant.[145]

In a strongly worded dissenting opinion, Justice Pivarnik, with whom Justice Prentice joined, argued that the defendant's appearance at trial in jail clothing did not unerringly cause the jury to be prejudiced to the extent the trial became a mockery of justice.[146] Additionally, Justice Pivarnik contended that the defendant had failed to carry his burden on his post conviction petition since there

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[141]396 N.E.2d at 901.

[142]*Id.* (quoting 425 U.S. at 504-05).

[143]396 N.E.2d at 901.

[144]*Id.*

[145]*Id.*

[146]*Id.* at 902 (Pivarnik, J., dissenting).

were no other grounds submitted by the petitioner to show inadequate representation throughout the rest of the trial. Finally, Justice Pivarnik rejected what he regarded as the majority's implication that counsel was incompetent throughout the entire trial in light of his "one mistake in his interpretation of the law."[147]

A final aspect of *Smith* worth noting is the dicta from the majority's opinion which provides helpful insight into the policy considerations involved in the supreme court's review of claims of inadequate representation. In *Smith*, the court stated:

> If every mistake or oversight made in the preparation of a case or at trial, perceived in the leisure of retrospection, should be considered probatory of legal incompetency, then a majority of all criminal defendants might validly assert such a claim. . . . This court has consistently sought to determine if and how a defense attorney's "inadequacies" have harmed the defendant at trial.[148]

The *Smith* dicta and other recently decided cases involving challenges to the competency of counsel demonstrate the court's focus on the actual prejudice that accrued to the defendant through the error of counsel. These recent decisions support the conclusion that *substantial* prejudice must be perceived by the court before it will grant relief to one making a claim of inadequate representation.

B. Professional Liability

1. Attorney's Liability to Third Parties.—In *Meier v. Pearlman*,[149] Meier filed an action against the attorneys who represented him and the attorneys who represented his adversaries in a false imprisonment action which resulted in a jury verdict adverse to him. The complaint alleged that Meier's attorneys and the defendants' attorneys had conspired to deprive Meier of his just compensation by "suppressing evidence, presenting false evidence, distorting the facts and truth of the evidence, producing fake witnesses without challenge, producing false evidence without challenge, and in limiting the scope and reach of Plaintiff's proof and damages."[150] Meier appealed from the grant of a motion for summary judgment in favor of Schilling and McGlone, attorneys for the defendants in the first action.

In their motion for summary judgment, Schilling and McGlone

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[147] *Id.*

[148] *Id.* at 900 (citations omitted).

[149] 401 N.E.2d 31 (Ind. Ct. App. 1980).

[150] *Id.* at 33.

argued that Meier's action against them was an "impermissible collateral attack on the judgment in Meier's first action for false imprisonment."[151] The court reviewed several decisions which involved impermissible collateral attacks on judgments and concluded by stating: *"[I]t has long been the law in Indiana that a litigant defeated in a tribunal of competent jurisdiction may not maintain an action for damages against his adversary or adverse witnesses on the ground that the judgment was obtained by false and fraudulent practices or by false evidence."*[152]

The court held that this rule which prevents an unsuccessful litigant from bringing a subsequent action against an adverse party or witness should also apply to the attorneys who represent the successful litigant in a previous action.[153] The court stated that the adoption of such a rule will advance the public policies of preventing the "unwarranted collateral attacks upon judgments which have not been vacated" and the "multiplication of vexatious litigation."[154]

The court's rejection of two arguments advanced by Meier provides additional insight into professional liability law in Indiana. Meier claimed that the Indiana Supreme Court's decision in *Ayres v. Smith*[155] gave him a right of action against Schilling and McGlone. In *Ayres*, an attorney prepared a claim for a claimant against an estate that he represented. The judgment received by the claimant was less than she thought she deserved. As a result, the claimant filed an amended claim and a motion to vacate the judgment due to what she alleged to be a fraudulent procurement. The supreme court held that an attack on a prior judgment for fraud in its procurement constitutes a direct attack and therefore is permissible.[156]

The Indiana Court of Appeals distinguished the *Ayres* case from the situation presented in *Meier* by stating that the attack in *Ayres* "was by an amended claim in the same proceeding . . . [which] sought recovery *on the basis of the merits of the claim itself*, not by way of action for damages against the attorney for the estate."[157] Thus, the court concluded that Meier's position was not supported by *Ayres*.

Meier also argued that Indiana Code section 34-1-60-9[158] authorized his cause of action against Schilling and McGlone. The court noted

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[151]*Id.* at 35.

[152]*Id.* at 38-39 (court's emphasis).

[153]*Id.* at 39.

[154]*Id.*

[155]227 Ind. 82, 84 N.E.2d 185 (1949).

[156]*Id.* at 90, 84 N.E.2d at 189.

[157]401 N.E.2d at 39 (court's emphasis).

[158]IND. CODE § 34-1-60-9 (Supp. 1980) provides in part:

An attorney who is guilty of deceit or collusion, or consents thereto, with in-

that the Indiana decisions which have considered this code section have involved actions against one's own attorney and direct attacks on judgments that were procured by fraud.[159] Moreover, the court took notice of the fact that cases decided in other jurisdictions have generally held that an attorney is not liable to third parties unless he engages in fraud, collusion, or a malicious or tortious act.[160] A review of these decisions from other jurisdictions convinced the Indiana Court of Appeals that: "IC 34-1-60-9 is but a legislative statement of the general rule, and affords no remedy against Schilling and McGlone in this case unless there is some showing of fraud, collusion, malicious or tortious conduct on their part toward Meier."[161]

The court concluded its opinion by holding that the record contained nothing which would even inferentially support a finding that Schilling and McGlone were guilty of fraud, collusion, or conduct which was malicious or tortious.[162]

Indiana Code section 34-1-60-9 was also the focus of another recently decided case. The Indiana Court of Appeals in *Anderson v. Anderson*[163] held that in order to sustain an action for attorney deceit the plaintiff must show that the defendant-attorney practiced the deceit in his role as an attorney.[164] Furthermore, the court held that section 34-1-60-9 does not create a new cause of action but merely trebles the damages recoverable for attorney deceit.[165] An attorney will not be liable for treble damages if the deceit was practiced in his "individual capacity as a citizen or party-litigant."[166]

The court in *Anderson* delineated what a plaintiff must prove in order to prevail on a claim under this statute. It held that the plaintiff must show that it was actually the attorney's fraudulent representations that caused him to suffer his damages.[167] On the issue of damages in deceit actions, the court noted that the measure

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tent to deceive a court or judge or a party to an action or judicial proceeding, commits a Class B misdemeanor, and he shall also forfeit to the party injured treble damages, recoverable in a civil action.

[159]401 N.E.2d at 40. *See* Barelli v. Levin, 480 F.2d 1207 (7th Cir. 1973); Trigg v. Criminal Court, 234 Ind. 609, 130 N.E.2d 461 (1955); Anderson v. Anderson, 399 N.E.2d 391 (Ind. Ct. App. 1979); Whitesell v. Study, 37 Ind. App. 429, 76 N.E. 1010 (1906).

[160]*See* Scavello v. Scott, 549 P.2d 1337 (Colo. Ct. App. 1976); McDonald v. Stewart, 289 Minn. 35, 182 N.W.2d 437 (1970).

[161]401 N.E.2d at 41 (citing Anderson v. Anderson, 399 N.E.2d 391 (Ind. Ct. App. 1979)).

[162]401 N.E.2d at 41.

[163]399 N.E.2d 391 (Ind. Ct. App. 1979).

[164]*Id.* at 403.

[165]*Id.*

[166]*Id.*

[167]*Id.*

of damages is the difference between what the plaintiff actually parted with and what he received.[168]

2. Imputation of an Attorney's Negligence.—Since the nineteenth century, Indiana appellate courts have consistently held that the negligence of an attorney will be imputed to his client.[169] This rule has frequently been enunciated without elaboration. In 1975 the Indiana Court of Appeals held that a client should not have his attorney's negligence imputed to him when such negligence is excusable.[170] However, this statement by the court did nothing more than integrate Indiana Trial Rule 60[171] into Indiana's rule on imputation of an attorney's negligence.

In *Rose v. Rose*,[172] however, the Indiana Court of Appeals carved out an exception to this general rule of imputation. The court held that "where the uncontradicted evidence discloses that the client exercised diligence but whose rights were forfeited by attorney misconduct, the latter's negligence should not be imputed to the client."[173] The court in *Rose* indicated that it was persuaded by language from a California case[174] which stated:

> As a general rule the accident or mistake authorizing relief may not be predicted upon the neglect of the party's attorney unless shown to be excusable [citations omitted], because the negligence of the attorney in the premises is imputed to his client and may not be offered by the latter as a basis for relief. [Citations omitted]. However, excepted from the rule are those instances where the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence. [Citations omitted]. The exception is premised upon the concept the attorney's conduct, in effect, obliterates the existence of the attorney-client relationship and for this reason his negligence should not be imputed to the client.[175]

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[168]*Id. Accord,* Rochester Bridge Co. v. McNeill, 188 Ind. 432, 122 N.E. 662 (1919). *But see* Hysewander v. Lowman, 124 Ind. 584, 24 N.E. 355 (1890).

[169]Indianapolis, D. & W. Ry. Co., v. Hood, 130 Ind. 594, 30 N.E. 705 (1892); Frazier v. Williams, 18 Ind. 16 (1862).

[170]Moe v. Koe, 165 Ind. App. 98, 330 N.E.2d 761 (1975).

[171]IND. R. TR. P. 60(B)(1) provides in part: "On motion and upon such terms as are just the court may relieve a party or his legal representative from an order, entry of default, proceeding, or final judgment, including a judgment by default, for the following reasons:

(1) mistake, surprise, or excusable neglect."

[172]390 N.E.2d 1056 (Ind. Ct. App. 1979).

[173]*Id.* at 1058.

[174]Buckert v. Briggs, 15 Cal. App. 3d 296, 93 Cal. Rptr. 61 (1971).

[175]390 N.E.2d at 1058 (quoting Buckert v. Briggs, 15 Cal. App. 3d at 301, 93 Cal. Rptr. at 63-64).

Thus, in order to avoid having the attorney's negligence imputed to him it seems a client must show that his attorney's conduct amounted to positive misconduct and that he was diligent and relatively free from negligence.

3. Statute of Limitations for Legal Malpractice.—It is not clear in Indiana which statute of limitations applies to legal malpractice actions. Different districts of the Indiana Court of Appeals have reached different results as to which statute of limitations is applicable. Although both statutes which have been approved by the different districts limit timely actions to those brought within a two-year period, they differ as to which actions are considered timely. One statute, Indiana Code section 34-4-19-1,[176] states that an action is timely if it is filed within "two (2) years from the date of the act, omission or neglect complained of." However, the other statute, Indiana Code section 34-1-2-2,[177] states that an action is timely if it's filed within two years of when the cause of action accrued.

The third district of the Indiana Court of Appeals held in *Cordial v. Grimm*[178] that section 34-4-19-1 was intended to apply in legal, as well as medical malpractice cases; thus, the court proceeded to evaluate whether the appellant's cause of action was filed in a timely manner by reviewing section 34-4-19-1. Incidental to the court's evaluation of the plaintiff's cause under this statute was its consideration of whether any fraudulent concealment tolled the statute and whether the statute was precluded from running until the plaintiff's actual discovery of the cause of action. The court concluded that the appellant failed to demonstrate the existence of any fraudulent concealment by the appellee which would toll the statute of limitations.[179] Furthermore, the court refused to accept the appellant's argument that section 34-4-19-1 does not run until the injured party actually discovers his cause of action.[180]

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[176]IND. CODE § 34-4-19-1 (1976) provides in part:

> No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, omission or neglect complained of.

[177]IND. CODE § 34-1-2-2 (1976) provides in pertinent part: "The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards.

First. For injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute, within two (2) years . . . ."

[178]169 Ind. App. 58, 346 N.E.2d 266 (1976).

[179]*Id.* at 69, 346 N.E.2d at 273.

[180]*Id.* (citing Toth v. Lenk, 164 Ind. App. 618, 330 N.E.2d 336 (1975); Merritt v. Economy Dept. Store, Inc., 125 Ind. App. 560, 128 N.E.2d 279 (1955). *Cf.* Ostojic v.

The court of appeals in *Cordial* also had to decide whether a legal malpractice action which included allegations of breach of contract and negligence was controlled by the statute of limitations given by section 34-1-2-1[181] or section 34-1-2-2. To decide this question, the court had to decide whether the nature of the plaintiff's action was *ex contractu* or *ex delicto*. The court concluded that the substance of the appellant's claim was a chose in action and therefore personal property.[182] Consequently, the court stated that "the trial court could have properly concluded" that section 34-1-2-2 was the applicable statute of limitations.[183] The court concluded its opinion by holding that the appellant's cause of action was barred under section 34-1-2-2 and under section 34-4-19-1.[184]

However, the first district of the Indiana Court of Appeals stated in *Shideler v. Dwyer*,[185] a case decided after *Cordial*, that the legislature did not intend for section 34-4-19-1 to apply to cases involving legal malpractice. Instead, the court used section 34-1-2-2 to determine if the plaintiff's action for legal malpractice was filed in a timely manner.

This position gained support from a decision of the Indiana Court of Appeals during the survey period. In *Anderson v. Anderson*,[186] the second district of the Indiana Court of Appeals stated: "A cause of action for legal malpractice, however, does not accrue until the aggrieved party has suffered both an injury to his property and damages."[187] The court cited *Shideler v. Dwyer*[188] as authority for this proposition. Implicit in this statement seems to be the court's opinion that section 34-1-2-2 is the appropriate statute of limitations for legal malpractice actions. Thus, two of four districts of the Indiana Court of Appeals seem to have indicated that section 34-1-2-2 should be the controlling statute of limitations in actions for legal malpractice.

There are several consequences of what may be regarded as a trend towards adopting section 34-1-2-2 as the controlling statute of

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Brueckmann, 405 F.2d 302 (7th Cir. 1968) (could be used to support the proposition that § 34-4-19-1 does not commence to run until the injured party actually knows of the wrongful act).

[181]IND. CODE § 34-1-2-1 (1976) is the statute of limitations pertaining to contracts in writing and provides in pertinent part: "The following actions shall be commenced within six (6) years after the cause of action has accrued, and not afterwards. . . . On accounts and contracts not in writing."

[182]169 Ind. App. at 64, 346 N.E.2d at 270.

[183]*Id.*

[184]*Id.* at 70, 346 N.E.2d at 273.

[185]386 N.E.2d 1211 (Ind. Ct. App. 1979).

[186]399 N.E.2d 391 (Ind. Ct. App. 1979).

[187]*Id.* at 401.

[188]386 N.E.2d 1211 (Ind. Ct. App. 1979).

limitations in legal malpractice cases. Adoption of this statute instead of section 34-4-19-1 may prevent Indiana courts from having to wrestle continually with allegations of fraudulent concealment, factual questions of when the attorney-client relationship terminated, and arguments that the statute is tolled until the plaintiff actually discovers his cause of action.[189]

However, another effect of adopting section 34-1-2-2 as the controlling statute of limitations in legal malpractice cases will be to immerse Indiana courts into the often confusing analysis of when a cause of action accrues. This confusion results from the attempt to pinpoint the time at which the legal injury and resulting damages coalesced so as to give rise to a cause of action.[190] Additionally, the use of section 34-1-2-2 instead of section 34-4-19-1 may in many cases cause the statute of limitations to be lengthened beyond two years from the date of the negligent act because damages often do not result until long after the legal injury is suffered.

Consequently, final determination as to the applicable statute of limitations in a legal malpractice action must await a definitive ruling by the Indiana Supreme Court. Since *Shideler* is presently pending on a petition to transfer, this ruling may come soon. In the interim, Indiana courts should apply careful analysis in determining the applicable statute of limitations and, more importantly, in determining when it begins to run.

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[189]These issues have been considered in cases construing IND. CODE § 34-4-19-1 (1976). *See* Ostojic v. Brueckmann, 405 F.2d 302 (7th Cir. 1968); Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956); Cordial v. Grimm, 169 Ind. App. 58, 346 N.E.2d 266 (1976) Toth v. Lenk, 164 Ind. App. 618, 330 N.E.2d 336 (1975).

[190]*See* Essex Wire Corp. v. M. H. Hilt Co., 263 F.2d 599 (7th Cir. 1959); Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928); Shideler v. Dwyer, 386 N.E.2d 1211 (Ind. Ct. App. 1979).

XIV. Property

WALTER W. KRIEGER*

During this survey year more than sixty cases involving the law of property were decided by the Indiana courts.[1] Many of these cases, however, neither change existing law nor present unique factual or legal problems. These cases are either excluded or merely summarized without extensive comment. The more significant cases are discussed under the following headings: (A) adverse possession, (B) concurrent estates and partition, (C) easements and covenants, (D) landlord and tenant relations, and (E) real estate transactions. Subjects not discussed under these headings include: condemnation by the state,[2]

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[1]There were no significant statutory developments during the survey period. One case decided during the survey period, State v. Innkeepers of New Castle, Inc., 392 N.E.2d 459 (Ind. 1979), is treated in the previous survey issue. *See* Falender, *Property, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 343, 355-57 (1980).

[2]In Highland Realty v. Indianapolis Airport Authority, 395 N.E.2d 1259 (Ind. Ct. App. 1980), Highland Realty appealed from a judgment permitting the Indianapolis Airport Authority to condemn Highland property. The court found that the airport authority could condemn property needed for a "clear zone," but that condemnations for a "clear area protection zone" and a "noise buffer zone" were not authorized. *Id.* at 1268. A "clear zone" is defined as an area at the end of a runway which permits additional clearance in case an aircraft undershoots the runway. A "clear area protection zone" is an area adjacent to the runway that is currently affected by noise. A "noise buffer zone" is the area that is expected to be affected by noise by the year 1995. A "clear zone" is required by the Federal Aviation Administration (FAA), but neither a "noise buffer zone" nor a "clear area protection zone" is required or even defined by the FAA. *Id.* at 1262-63.

The airport authority had sought to condemn the latter zones in hopes of avoiding inverse condemnation suits. Inverse condemnation is an action to recover damages for a taking of property that has not been formally condemned. BLACK'S LAW DICTIONARY 740 (5th ed. 1979). The United States Supreme Court has held that aircraft overflight and accompany noise constitute a compensable taking under the fifth amendment. United States v. Causby, 328 U.S. 256 (1946). The Supreme Court has, however, also tacitly approved the requirement of a physical invasion of the superadjacent space for there to be a taking. Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955, *rehearing denied*, 372 U.S. 925 (1963). Thus, damage done by noise without direct overflight is generally incidental and not recoverable, although a few states have held airports responsible for a taking when noise of aircraft substantially decreases the value of the property. City of Jacksonville v. Schumann, 167 So. 2d 95 (Fla. Dist. Ct. App. 1964); Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962); Ackerman v. Port of Seattle, 55 Wash. 2d 400, 348 P.2d 664 (1960). In those

water law,[3] conditional land sales contracts,[4] mechanics liens,[5] mortgages,[6] real property taxation,[7] bailments,[8] zoning,[9] and the right of a

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jurisdictions that have recognized noise damage as a compensable taking, the state constitution provides compensation for "taking or damaging." *See* Baxter & Altree, *Legal Aspects of Airport Noise*, 15 J.L. & ECON. 1, 34-40 (1972).

Indiana's constitution provides for damages only for a "taking" of property. IND. CONST. art. 1, § 21. The majority of Indiana cases dealing with inverse condemnation are concerned with the right of access to roads. *See* Note, *Inverse Condemnation and the Right of Access of Abutting Property Owners*, 9 IND. L. REV. 859 (1976). The Indiana Supreme Court has recognized a right to compensation for taking an airport easement for approaches to a runway. Indiana Toll Rd. Comm'n v. Jankovich, 244 Ind. 574, 193 N.E.2d 237 (1963), *cert. dismissed*, 379 U.S. 487 (1965). Indiana courts have not considered whether noise alone is sufficient damage for a compensable taking. Therefore it is unclear whether an inverse condemnation suit based on noise damage would be successful.

[3]In Davidson v. Mathis, 389 N.E.2d 364 (Ind. Ct. App. 1979), the court stated that when surface water flows in a definite direction in a regular channel with well defined banks and bottom for a substantial period of each year, it is a water course. *Id.* at 365 n.1 (citing Lowe v. Loge Realty Co., 138 Ind. App. 434, 436, 241 N.E.2d 400, 402 (1966)). Therefore, the court enjoined the lower landowner from blocking the drainage from the upper lands. Had this been merely surface water, the lower landowner could have taken whatever action was necessary to prevent the water from entering upon his land. Clay v. Pittsburgh, C., C. & St. L. Ry., 164 Ind. 439, 73 N.E. 904 (1905); Kinyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891 (1940).

In Suburban Homes Corp. v. Harders, 404 N.E.2d 629 (Ind. Ct. App. 1980), the corporation sought to establish a legal drain on Harders' property. Mrs. Harders argued that because the drain was not one established by the mutual consent of two or more property owners, it could not be made a legal drain. IND. CODE § 19-4-5-3(c) (1976). In holding for Mrs. Harders, the court determined that the presence of previously laid drainage tile and a culvert between the properties was not sufficient evidence of mutual consent. *Id.* at 633. Rather, the ordinary meaning of "mutual drain" is an artificial drain actually built by the parties, not a drain that is simply used by the parties with their mutual consent. *Id.* at 632. The court noted, however, that a natural watercourse can be made a legal drain. *Id.*

[4]Several decisions during this survey period dealt with the continuing saga of Skendzel v. Marshall, 261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974), in which the court recognized that the conditional sales land contract is an equitable mortgage, which gives the purchaser the rights of a mortgagor. These cases are discussed in Townsend, *Secured Transactions and Creditors' Rights, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. ____ (1981).

[5]Cases involving mechanics liens are discussed in Townsend, *Secured Transactions and Creditors' Rights, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. ____ (1981).

[6]Cases dealing with mortgages are discussed in Townsend, *Secured Transactions and Creditors' Rights, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. ____ (1981).

[7]The Indiana Court of Appeals, in Hawkins v. Marion County Bd. of Review, 394 N.E.2d 957 (Ind. Ct. App. 1979), held that an Indiana resident purchasing property on a conditional sales contract with a contractual obligation to pay the real estate taxes, is not "one who owns real property" for purposes of qualifying for a mortgage tax deduction. *Id.* at 959-60. *See* IND. CODE § 6-1.1-12-1(a) (1976). The court determined that distinguishing equitable and legal owners of real property is not an irrational and invidi-

ous discrimination in violation of the equal protection clause of the United States Constitution. It deferred to the legislature to grant relief. 394 N.E.2d at 961. The legislature responded by amending the statute. IND. CODE § 6-1.1-12-1(a) (1976) (amended by Act of Mar. 3, 1980, Pub. L. No. 39, § 1, 1980 Ind. Acts 507) (effective Jan. 1, 1980) (this amendment effectively overrules *Hawkins*). The legislature also enacted the Homestead Credit Act, IND. CODE §§ 6-1.1-20.9-1 to -6 (Supp. 1980), which provides a tax credit to persons, other than the legal title holder, who must pay the real estate taxes.

In State v. George, 401 N.E.2d 680 (Ind. 1980), the Indiana Supreme Court held that a sister who held property jointly with rights of survivorship with her deceased brother was entitled to an exclusion from inheritance tax for her one-half interest in the property. The state argued that because the brother had conveyed the joint interest to his sister in 1960, the sister would be unable to show that one-half of the property had never belonged to the brother. Therefore, an inheritance tax should be imposed on the entire property. The court, however, found this interpretation of the statute to be too strict. *Id.* at 682. *See* IND. CODE § 6-4-1-1 (repealed 1976), which provided that jointly held property would be treated as devised or bequeathed to the survivor, and was therefore taxable.

Under the current statute, IND. CODE § 6-4.1-2-5 (1976), property held jointly with rights of survivorship, upon the death of one of the joint owners, is valued for inheritance tax purposes as the total value of the property less the value of the portion the surviving joint owner can prove belonged to him and never belonged to the deceased owner. Thus, the court could have reached the same conclusion under the current statute. Although the facts are incomplete, the court suggested that title to the property was erroneously put in the brother's name alone when his parents died intestate. If so, the sister would have owned a one-half interest in the property from the time of her parents' deaths, and the conveyance by brother to sister in 1960 only confirmed a factual situation that existed prior to the transfer. Furthermore, brother and sister treated the property as jointly held, with each living and working on the property and each paying tax on one-half of the income generated by the property.

[8]The court of appeals decided two cases that raised bailment issues. Hainey v. Zink, 394 N.E.2d 238 (Ind. Ct. App. 1979), involved an automobile accident which occurred while defendants' tow truck was towing plaintiff's vehicle. The plaintiff argued that a trial court instruction, that the accident and resulting damages raised no presumption of wrongdoing, was erroneous. The court of appeals agreed and held that because receipt of the vehicle by the bailee in good condition and return to the bailor in a damaged condition raised an inference of negligence on the part of the bailee, the instruction was confusing. *Id.* at 241-42.

In French v. Hickman Moving & Storage, 400 N.E.2d 1384 (Ind. Ct. App. 1980), the court affirmed a summary judgment in favor of the defendant which had sold plaintiff's household items after several attempts to contact the plaintiff about payment for storage of the items. The plaintiff failed to bring her action within the two-year statute of limitations, which began to run at the time of the sale. She asserted that there was a confidential relationship between herself and the defendant because of the bailment; failure to disclose material information resulted in concealment. By not notifying her of the sale, the defendant had concealed the cause of action; thus, the statute of limitations should not have begun to run until she received actual notice. The court, however, held that while there is a certain degree of confidence with respect to care and custody in an ordinary bailment, that alone does not establish a confidential relationship. *Id.* at 1389. Because the plaintiff failed to establish any other factor creating a confidential relationship, the court found there was no such relation and therefore no fraudulent concealment of the sale. *Id.*

[9]While there were a plethora of zoning cases decided during this survey period,

remote vendee to recover from a builder-vendor on an implied warranty of habitability.[10]

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most were of a routine nature. One decision worthy of comment is Jacobs v. Mishawaka Bd. of Zoning Appeals, 395 N.E.2d 834 (Ind. Ct. App. 1979). At the time the property was zoned as a C-1 use (commercial), a gasoline service station classified as a C-4 use was in existence and operating on the premises. To prohibit the continuation of an existing lawful use within a zoning area is both unconstitutional "as a taking of property without due process of law and as an unreasonable exercise of police power." *Id.* at 836. Thus, operation of the service station became a non-conforming use, or a use of premises which lawfully existed prior to the enactment of a zoning ordinance and which is allowed to continue even though it does not comply with the use restrictions presently applicable to the area. *Id.* at 835-36. The use of the premises as a service station was subsequently discontinued and a used car business, also classified as a C-4 use, was opened. The trial court affirmed an order to cease and desist operation of the used car lot, and the property owner appealed. The court of appeals reversed, interpreting the language in the Mishawaka Zoning Ordinance which prohibited the change of a non-conforming use "to another non-conforming use of greater restriction," to mean "to another non-conforming use of a more restricted zoning classification." *Id.* at 837-38. Because a used car business is also a C-4 use, the court found that it was a permissible non-conforming use under the zoning ordinance.

In a well reasoned dissenting opinion, Judge Staton noted that "the policy of zoning ordinances is to secure the gradual, or eventual elimination of non-conforming uses and *to restrict or diminish rather than increase such uses.*" *Id.* at 840 (Staton, J., dissenting). The majority opinion would increase and prolong non-conforming uses. For example, it would permit a landowner operating a non-conforming C-1 use of the premises as an antique shop to replace it with a motor bus terminal, bowling alley, dance hall, tavern or any of a myriad of activities which are also designated as C-1 uses. *Id.* Clearly this could not have been the intent of the ordinance and thus the phrase "greater restriction" is not synonymous with "more restricted zoning classification." *Id.* at 840-41.

In Metropolitan Dev. Comm'n v. Marianos, 401 N.E.2d 28 (Ind. Ct. App. 1979), the court of appeals held that it is insufficient to merely establish that a non-conforming use existed at some time prior to the enactment of a zoning ordinance. In order to establish a non-conforming use it must be shown that the use existed at the time of the zoning restrictions and has continued since that time in non-conformance to the ordinance. *Id.* at 30. The trial court failed to find that the use existed on the effective date of the ordinance. *Id.* at 31.

[10]In 1971 Indiana joined a growing number of jurisdictions which recognize an implied warranty of habitability from a builder-vendor to the purchaser of a new home. Theis v. Heuer, 149 Ind. App. 52, 270 N.E.2d 764 (1971), *transfer granted and opinion adopted*, 264 Ind. 1, 280 N.E.2d 300 (1972). Indiana became one of the first states to extend this implied warranty of the builder-vendor to a subsequent purchaser. Barnes v. Mac Brown & Co., 264 Ind. 227, 342 N.E.2d 619 (1976); Polston, *Property, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 297, 299-302 (1976).

In Wagner Constr. Co. v. Noonan, 403 N.E.2d 1144 (Ind. Ct. App. 1980), a subsequent purchaser of a house sued the builder-vendor for breach of an implied warranty of habitability because of a defective septic tank system which caused raw sewage to back into the basement. The plaintiff recovered a small claims judgment of $632.66 and the defendant appealed. Four major issues were raised on appeal: (1) Whether an implied warranty of habitability should be extended to a second purchaser in the absence of privity of contract; (2) Whether five years is an excessive time period to extend the implied warranty of habitation against the original builder; (3) Whether the defect was

A. Adverse Possession

To acquire title to land by adverse possession, the possession must be: (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous.[11] In addition, Indiana Code Section 32-1-20-1 requires that the adverse possessor pay all taxes and special assessments on the land during the period he claims to have possessed the land adversely. These requirements were addressed in two interesting cases decided during this survey period.

In *Berrey v. Jean*,[12] the plaintiffs, two individuals and a cemetery association, claimed title by adverse possession and brought an action to quiet title to land against the record owners. The property, known as Williams Cemetery, had been utilized for systematic burial since before 1880. For sixty years, four concrete

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serious enough to warrant application of the doctrine of implied warranty of habitability; and (4) Whether a breach of the implied warranty of fitness for habitability may be applied against the builder when the purchaser fails to notify the builder and consequently the builder has had no opportunity to correct the problem. *Id.* at 1145-46.

On the first issue the court noted that the Indiana Supreme Court had rejected the privity requirement in *Barnes*. "The traditional requirement of privity between a builder-vendor and a purchaser is an outmoded one." *Id.* at 1146.

Addressing the second issue, the duration of the warranty, the court held that "[t]he duration of the implied warranty of fitness for habitation is determined by the standard of reasonableness," *id.* at 1148, and that a five year period was not too long a period of time to extend the warranty to a latent defect in a septic system because it is common knowledge that the expected life of a properly installed septic system is greater than five years. *Id.* The court noted that the builder-vendor need not be concerned about extending the warranty into the distant future because all claims would be extinguished at the expiration of ten years from the date of substantial completion, pursuant to IND. CODE § 34-4-20-2 (Supp. 1980). *Id.* at 1148 n.3. In another decision, Walsh v. Halteman, 403 N.E.2d 894 (Ind. Ct. App. 1980), the court noted that IND. CODE § 34-4-20-2 (1976) was amended in 1977 to include construction deficiencies. Thus, the ten-year statute of limitation now governs actions based upon breach of an implied warranty of habitability.

With regard to the third issue, whether the defect was sufficiently serious to warrant the application of the implied warranty of habitability, the court concluded that breach of the warranty is established by proof of a defect of a nature which substantially impairs the enjoyment of the residence. 403 N.E.2d at 1148. Raw sewage in the basement of a residence is more than a minor inconvenience and substantially impairs the intended use and enjoyment of the dwelling for habitation.

Finally, the court addressed the notice issue. The court noted that in personal property cases, notice of the breach has been held to be a condition precedent to recovery. IND. CODE § 26-1-2-607(3)(a) (1976). There was no evidence that the plaintiff ever gave notice of the alleged breach of warranty to the defendant. While no particular form of notice is required, the court concluded that the notice must at least inform the builder-vendor of the problem and give him a reasonable opportunity to cure the defect. 403 N.E.2d at 1150. The judgment was reversed on this issue. *Id.*

[11]Worthley v. Burbanks, 146 Ind. 534, 539, 45 N.E. 779, 781 (1897).

[12]401 N.E.2d 102 (Ind. Ct. App. 1980).

corner posts enclosed the gravesites. Members of the community considered these posts as indicating the boundary of the cemetery. A fence which had previously enclosed the area stood on only three sides for thirty-three years; the unenclosed side bordered a highway. An access to the cemetery across the defendants' land was utilized for approximately forty-five years.[13]

The defendants stipulated to the existence of the cemetery and the right of access across their land but contested the extent of the cemetery property, arguing that the boundaries should be restricted to existing gravesites with a ten-foot perimeter and not to the entire area defined by the posts and fence.[14] There was no evidence of any physical use of the disputed area and the trial court quieted title to the property in the plaintiffs. In affirming the judgment of the trial court, the court of appeals noted: "Actual possession has been held to be satisfied if the claimant's possession consists of use to which the land by its nature is suited."[15] Since the land was suitable for use as a cemetery, such use "by its nature requires open space in which to accomodate future burials."[16] This statement might be misleading read outside the context of the case. It seems to suggest that where a part of the land is being physically possessed, the adverse possessor could claim title to additional areas that might be suitable for future expansion for a similar use.[17]

Courts have often relaxed the actual possession requirement where the land, because of its location or physical condition, will not permit a more open, actual, notorious or continuous possession.[18] Although the *Berrey* court cited *Gibson v. Berstein*[19] in support of its position that the use need only be suitable to or consistent with the nature of the land, the facts of *Gibson* are far different from those in *Berrey*. In *Gibson*, the land at the time of the tax sale was worth three to five dollars, was not capable of practical cultivation,

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[13]*Id.* at 104.

[14]*Id.*

[15]*Id.* at 106.

[16]*Id.*

[17]This would be true where a person takes possession of a portion of the land under color of title. 3 AMERICAN LAW OF PROPERTY § 15.11 (A.J. Casner ed. 1952) [hereinafter cited as A.L.P.]. Actual possession of a portion of the land described by the instrument will give him constructive possession of the entire area. City of Noblesville v. Lake Erie and W.R.R. Co., 130 Ind. 1, 29 N.E. 484 (1891). *See* cases cited in Worthley v. Burbanks, 146 Ind. 534, 539-40, 45 N.E. 779, 781 (1897).

[18]Wineberg v. Moore, 194 F. Supp. 12 (N.D. Cal. 1961); Gibbons v. Yosemite Lumber Co., 190 Cal. 168, 172, 211 P. 4, 5 (1922); Worthley v. Burbanks, 146 Ind. 534, 45 N.E. 779 (1897); Whalen v. Smith, 183 Iowa 949, 953, 167 N.W. 646, 647 (1918); Howard v. Kunto, 3 Wash. App. 393, 477 P.2d 210 (1970).

[19]72 Ind. App. 681, 126 N.E. 491 (1920).

and could not be used profitably for any purpose. Thus, going upon the land, locating the corner stones and stakes, and periodically visiting the land were considered exercising all the acts of possession and control of which the land was susceptible.[20] However, in *Berrey* there was no indication that the land could not be used profitably for some purpose which would allow physical possession. While the statement that accomodation of future burials is sufficient use to acquire title by adverse possession might be questionable, the court in *Berrey* also found that the fence and corner posts had been open and visible sixty years or longer and that these monuments were considered to be the boundaries of the cemetery by long-time residents "as long as they could remember."[21] Because acts of possession were performed which were actual, visible, open, notorious and exclusive, holding a portion of the land for future use was consistent with a claim of ownership to the entire area.

The defendants also argued that, as required by statute,[22] the plaintiffs, in order to acquire title by adverse possession, must show that they had paid all taxes and special assessments on the land during the period they possessed the land adversely.[23] In rejecting this argument, the court noted that the cases construing the statute "have not demanded its rigid application in all situations."[24] The court cited *Echterling v. Kalvaitis*,[25] in which the Indiana Supreme Court stated that the intent of the legislature in enacting the statute was to put an end to the practice in the northern portion of the state whereby squatters were obtaining title to large tracts of unoccupied land on which the absentee owners were paying taxes.[26] The tax requirement was intended to provide notice to the record owner that an adverse claimant was making a claim to his land.[27] Because the trial court in *Berrey*, however, had found that the plaintiffs acquired title at a point in time prior to the defendants' purchase of the land, notice to the defendant of their claim by the payment of taxes would not have affected the outcome.[28] In addition, the court concluded that the statute "must be construed as being supplemental to the statute of limitations and not as superseding it."[29]

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[20]*Id.* at 684-86, 126 N.E. at 492-93.

[21]401 N.E.2d at 105.

[22]IND. CODE § 32-1-20-1 (1976).

[23]401 N.E.2d at 104, 105.

[24]*Id.* at 105.

[25]235 Ind. 141, 126 N.E.2d 573 (1955).

[26]*Id.* at 145, 126 N.E.2d at 575; *see* Note, *Adverse Possession in Indiana*, 16 NOTRE DAME LAW. 216, 219-20 (1941).

[27]401 N.E.2d at 105. *See* 235 Ind. at 145, 126 N.E.2d at 575; Kline v. Kramer, 386 N.E.2d 982, 989 (Ind. Ct. App. 1979).

[28]401 N.E.2d at 105.

[29]*Id.* (quoting 235 Ind. at 146, 126 N.E.2d at 575).

In *McCarty v. Sheets*,[30] McCarty brought suit to require Sheets, an adjoining landowner, to move a portion of his garage which extended approximately two feet beyond their mutual property line. The adjoining landowner counterclaimed to quiet title. Sheets acquired title to the land in 1956, but his garage had existed in its present location since 1937.[31] Sheets had cut weeds around the garage, raked leaves on the property, and mowed the grass to the middle line between his garage and McCarty's garage.[32] The trial court quieted title to a strip of land four feet two inches wide along the entire west property line "to give to [Sheets] the land located between the garage of [Sheets] and the garage of [McCarty] to a point half way between said buildings."[33] It is clear from a sketch of the property contained in the opinion that the garage occupied only a small portion of the western property line.[34] Despite the absence of any physical manifestation of the true boundary line, such as a fence or shrub, the court affirmed the judgment of the trial court quieting title to the strip along the entire boundary line, holding that the absence of a fence or shrub should not defeat Sheets' title to the area which he had mowed and maintained.[35]

Judge Hoffman, in a dissenting opinion, would have limited the area quieted to that occupied by the garage: "No fence or markings of any kind showed where the boundary line existed. It is a sad day in Indiana when the courts take a man's land from him on evidence of mowing grass on the side and behind a garage."[36] He also questioned compliance with the provisions of the statute requiring the adverse possessor to pay taxes on the land.[37] In boundary line disputes, however, the Indiana courts have uniformly held that the provisions of the statute are inapplicable.[38] In such cases each adjoining owner is paying taxes on his land and improvements. The tax duplicates issued by county or city treasurers are usually so sketchy and inaccurate that they would not give notice to the record

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[30]391 N.E.2d 834 (Ind. Ct. App. 1979).

[31]The court noted that periods of adverse possession can be tacked from grantor to grantee. Since Sheets' predecessors in title had occupied the disputed strip in a similar manner, Sheets had acquired title by adverse possession even before McCarty bought the adjoining property in 1967. *Id.* at 836.

[32]*Id.*

[33]*Id.* at 837.

[34]*Id.* at 836.

[35]*Id.* at 837.

[36]*Id.* at 838 (Hoffman, J., dissenting).

[37]*Id.*

[38]Echterling v. Kalvaitis, 235 Ind. 141, 126 N.E.2d 573 (1955); Berrey v. Jean, 401 N.E.2d 102 (Ind. Ct. App. 1980); Kline v. Kramer, 386 N.E.2d 982 (Ind. Ct. App. 1979); Penn Cent. Transp. Co. v. Martin, 170 Ind. App. 519, 353 N.E.2d 474 (1976).

owner that a neighbor was claiming an interest in his land, whereas notice would be given if a squatter suddenly paid the taxes on the entire tract of land.[39]

Another problem raised in boundary line disputes is the requirement that possession be hostile and under claim of right. In most cases the possession is based on a mistake concerning the true boundary line; if called as a witness, the possessor would freely admit that he did not intend to claim more than he actually owned.[40] This has led some courts to hold that such possession is not hostile or under claim of right.[41] Indiana, however, following the weight of authority,[42] has held that when an owner of land takes actual, visible and exclusive possession of the land under a mistake as to the true boundary line and holds it for the statutory period for adverse possession, he thereby acquires title as against the record owner.[43] Once title vests, title is not lost even though he pays rent to the record owner, agrees to survey the land, or offers to buy the disputed area. Likewise, such acts do not work an estoppel.[44] In *McCarty*, Sheets agreed to pay half the cost of the survey, offered to erect eave troughs on the garage to prevent runoff onto McCarty's property, and offered to purchase the disputed area.[45] These pacification efforts, however, did not work an estoppel since the trial court found that Sheets already owned the land by adverse possession at the time the offers of conciliation were made.[46]

B. Concurrent Estates and Partition

When two or more person take as tenants in common under an instrument which is silent regarding their respective interests, there is a presumption that their shares are equal.[47] In *Baker v.*

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[39]Echterling v. Kalvaitis, 235 Ind. 141, 146, 126 N.E.2d 573, 575 (1955).

[40]Kotze v. Sullivan, 210 Iowa 600, 602-03, 231 N.W. 339, 340 (1930); Van Allen v. Sweet, 239 Mass. 571, 574, 132 N.E. 348, 349 (1921); Burns v. Foster, 348 Mich. 8, 10, 81 N.W.2d 386, 387 (1957); Howard v. Kunto, 3 Wash. App. 393, 396 n.4, 477 P.2d 210, 213 n.4 (1970).

[41]*E.g.*, United States v. Wilcox, 258 F. Supp. 944 (N.D. Iowa 1966); Boyle v. D-X Sunray Oil Co., 191 F. Supp. 263 (N.D. Iowa 1961); Ikola v. Goff, 31 Cal. App. 3d 872, 107 Cal. Rptr. 663 (1973); Miller v. Department of State Highways, 30 Mich. App. 64, 186 N.W.2d 67 (1971); Adams v. White, 488 S.W.2d 289 (Mo. Ct. App. 1972).

[42]Annot., 80 A.L.R.2d 1171 (1961). *See* 3 A.L.P., *supra* note 17, § 15.5.

[43]Rennert v. Shirk, 163 Ind. 542, 72 N.E. 546 (1904). *See also* authorities cited in note 38 *supra*.

[44]Kline v. Kramer, 386 N.E.2d 982, 987 (Ind. Ct. App. 1979).

[45]391 N.E.2d at 836.

[46]*Id.*

[47]4 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1797 (repl. ed. 1979); 2 A.L.P., *supra* note 17, § 6.5.

Chambers,[48] a case of first impression, the court of appeals concluded that as between the immediate parties this presumption is rebuttable. The parties, Frank Baker and Zona Chambers, acquired title to the property in question as "husband and wife," but were not married at the time of the conveyance.[49] Had they in fact been husband and wife, the conveyance to them would have created a tenancy by the entireties.[50] However, because Indiana abolished common law marriages in 1958[51] and because the conveyance did not include words of survivorship,[52] the court concluded that the conveyance created a tenancy in common.[53] Zona Chambers brought an action for partition claiming a half interest in the property, and the trial court granted her motion for summary judgment.[54] In reversing the decision, the court of appeals held that despite the wording of several earlier Indiana decisions which could be read as creating an irrebuttable presumption of equal shares[55] between the original parties, the presumption is rebuttable.[56] Because Baker stated by affidavit that he paid the entire consideration, that the bank required the nomenclature in the deed, and that no gift of a half interest was contemplated, the court determined that a question of fact was raised which precluded summary judgment.[57] In dictum, the court stated that if the parties involved were not the orginal parties, but were, for example, subsequent purchasers, creditors, or lienholders, the presumption of equal shares would have been conclusive.[58]

While recognizing the general rule that marriage alone does not create an agency relationship,[59] the court of appeals in *Moehlenkamp v. Shatz*[60] affirmed the trial court's use of an implied agency theory

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[48]398 N.E.2d 1350 (Ind. Ct. App. 1980).

[49]*Id.* at 1351.

[50]Where a conveyance is made to a husband and wife without any words limiting the estate, they hold as tenants by the entirety. Brown v. Brown, 133 Ind. 476, 477, 32 N.E. 1128, 1128 (1893).

[51]IND. CODE § 31-1-6-1 (Supp. 1980).

[52]All conveyances to two or more persons not husband and wife shall create a tenancy in common unless words of survivorship or an intent to create a joint tenancy shall manifestly appear from the tenor of the instrument. IND. CODE § 32-1-2-7 (1976).

[53]398 N.E.2d at 1351-52.

[54]*Id.* at 1351.

[55]Spanier v. Spanier, 120 Ind. App. 700, 96 N.E.2d 346 (1951); Singleton v. Cushman, 117 Ind. App. 183, 70 N.E.2d 642 (1947) (could be read as holding that the presumption of equal shares is irrebuttable).

[56]398 N.E.2d at 1352.

[57]*Id.* at 1351-52.

[58]*Id.* at 1352.

[59]Martz v. Selig Dry Goods Co., 76 Ind. App. 135, 131 N.E. 528 (1921); Bergh v. Warner, 47 Minn. 250, 50 N.W. 77 (1891).

[60]396 N.E.2d 433 (Ind. Ct. App. 1979).

to foreclose a mortgage signed by the husband.[61] The only evidence of an agency relationship was that the husband had handled all the business affairs of the family including the purchase of real estate, the securing of loans, and the filing of income tax returns.[62] The court gave considerable weight to the fact that the husband had previously obtained a loan on the real estate without first informing his wife of the arrangement and that she subsequently signed the papers.[63] The court was not impressed that the wife had informed her husband that she did not like him taking out a loan without her consent and that she "would rather he not do that anymore."[64] While the court cited statutory authority[65] for the rule that no particular form of appointment is necessary to authorize an agent to sign his principal's name to a negotiable instrument, the court ignored the provisions of another statute[66] which requires written authority of an agent to sign his principal's name on a mortgage. Perhaps the court did not consider this point because it concluded that there was sufficient evidence to support the trial court's judgment on the alternative theory that the wife had actually signed the note and mortgage.[67]

One of the more interesting cases, *Burford v. Burford*,[68] was a suit to partition two adjoining tracts of land spanned by a common building. In 1945 the Piel family leased Parcel I to S.S. Kresge Co. and at the same time, but by a separate lease, the Burford family

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[61]*Id.* at 437.

[62]*Id.*

[63]*Id.*

[64]*Id.* at 436.

[65]IND. CODE § 26-1-3-403(1) (1976).

[66]*Id.* § 32-1-10-1.

[67]396 N.E.2d at 437.

[68]396 N.E.2d 394 (Ind. Ct. App. 1979).

Another case pointing up the complexities of partition suits is Gilstrap v. Gilstrap, 397 N.E.2d 1277 (Ind. Ct. App. 1979). In an attempt to partition three tracts of land, court-appointed commissioners ordered two tracts sold but found a third tract divisible in severalty with the condition that a sum be paid by one cotenant to another to make the shares equal because the land could not be exactly divided. Unfortunately, in evaluating the land, the commissioners failed to consider a zoning ordinance requiring a sixty foot wide access to industrial property; thus, the designation and valuation of a portion of the property were incorrect. *Id.* at 1281. The trial court committed reversible error when it based the acreage in the final decree upon the description in the petition and not on the acreage in the survey and commissioners' report. *Id.* at 1280. Reversing the case, the court made two important observations: (1) The report of the commissioners should be viewed as a jury verdict rendered upon a trial at law, and it should be disturbed by the court only upon grounds similar to those on which a verdict would be set aside and a new trial granted, *id.* at 1282; and (2) although the court may order a partition and divide the property, once the court appoints commissioners and they render a report, the court must either accept that report or set it aside; the court may not make any adjustments in the recommended distribution. *Id.*

leased Parcel II to Kresge. Under the terms of the separate leases, Kresge had the right to construct a six-story commercial building spanning both parcels in such a manner that the building could be converted into two separate buildings at the expiration of the leases. The building was not so constructed and Kresge separately settled both claims for damages with the owners of the two parcels.[69] Plaintiff, a cotenant of Parcel II, filed suit to partition the building and the two parcels by sale, claiming that they could not be partitioned separately without damage to the whole.[70] The trial court dismissed the petition. The court of appeals, reversing in part, held that the plaintiff was entitled to partition of Parcel II and the portion of the building thereon but denied his right to partition Parcel I or the entire building. The court concluded that each lease contemplated converting the building into two separate buildings, one on each parcel, at the end of the lease, and only Kresge's failure to comply with the terms of the lease prevented this from happening.[71] Thus, there was no intent to create a "community of interest" or "common ownership" in the building as a whole.[72]

Two cases cited by the court denied partition on the theory that each owned a part of the property in severalty. In one case, the party owned a definable floor in a building,[73] and in the other case, the party owned a particular room in the building.[74] These cases can, however, be distinguished from *Burford* in that no practicable use can be made of the separate portions of the building, and apparently each portion was of little or no value apart from the whole. Whatever may have been the original intent of the parties regarding their interest in the building, its fulfillment was rendered impossible by Kresge's failure to comply with the terms of the separate agreements. Payment of damages by Kresge does not make fulfillment of the agreements possible, and to leave the parties with worthless parts of a potentially valuable whole results in economic waste.

C. Easements and Restrictive Covenants[75]

It is generally recognized that the holder of an easement over

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[69]396 N.E.2d at 395.

[70]*Id.* at 395-96.

[71]*Id.* at 397.

[72]*Id.*

[73]Anderson School Township v. Milroy Lodge F. & A.M., No. 139, 130 Ind. 108, 29 N.E. 411 (1891).

[74]School Corp. v. Russelville [*sic*] Lodge, No. 141, F. & A.M., 140 Ind. 422, 39 N.E. 549 (1895).

[75]Another case, involving a covenant not to compete, Unishops, Inc. v. May's Family Centers, Inc., 399 N.E.2d 760 (Ind. Ct. App. 1980), is discussed in the section on Landlord and Tenant, p. 481 *infra*.

the land of another may enjoin the servient tenant from interfering with the use and enjoyment of the easement; yet, the owner of the servient estate may make any use of his land which does not interfere with the use and enjoyment of the easement by the dominant tenant.[76] In *Holding v. Indiana & Michigan Electric Co.*,[77] Indiana and Michigan Electric Company (I&M) acquired an easement for the purpose of transmitting electric current, which included the right to maintain poles and cables across the land of the appellants. The appellants, who were operating an automobile salvage business on the premises, subsequently spread earth fill over a marshy portion of the land, thereby decreasing the clearance between the cables and the ground. I&M discovered this fact when a temporary disruption in the flow of electricity resulted from a dump truck's coming in contact with a cable above the appellant's land.[78] I&M asked for an injunction requiring the appellants to remove the amount of fill dirt necessary to re-establish a twenty-two foot clearance, or alternatively, to pay the cost of adding extensions to the poles and restringing the cables.[79] Appellants argued they were in compliance with the National Electric Safety Code provisions relating to heights of high-voltage transmission lines above the ground.[80] First, they urged that they did not interfere with the transmission of electricity. Second, they suggested that their particular type of business activity was not covered by the Safety Code provisions. In rejecting these arguments and affirming the permanent injunction, the court noted that the National Electric Safety Code established only minimum standards; that Indiana had long recognized the dangerous propensities inherent in electricity; that acquisition of an easement for a public service effectively removed private use of the area to the extent it interfered with the public use; and that "exercise of safety practices in the operation of high voltage transmission lines [was] one of the incidents to the use and enjoyment of the easement."[81]

While not specifically a case involving an easement, *Dolph v. Mangus*[82] made an interesting distinction between prescriptive easements and the statute of limitations. The plaintiff alleged that the defendants' alteration of the natural flow of surface water caused damage to his cropland. The defendants had constructed an extensive drainage system across their lands in 1948 which released

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[76]W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY 86 (3d ed. 1965); J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 344 (2d ed. 1975).

[77]400 N.E.2d 1154 (Ind. Ct. App. 1980).

[78]*Id.* at 1155-56.

[79]*Id.* at 1156.

[80]*Id.*

[81]*Id.* at 1158.

[82]400 N.E.2d 189 (Ind. Ct. App. 1980).

water onto the plaintiff's land. The court found that the resulting drainage created a "permanent injury"[83] which started the statute of limitations running. Therefore, the plaintiff's action to recover damages for the flooding and erosion of his land was barred by the six-year statute of limitations.[84] There was no discussion of the plaintiff's request for injunctive relief, but perhaps the court concluded that because the injury was of a permanent nature, there was no continuing or recurring injury for which injunctive relief could be granted. The court went to considerable lengths, however, to distinguish a prescriptive easement, which is positive and creates rights, and the statute of limitations, which is negative and destroys remedies.[85] Rejection of the defendants' claim of a prescriptive easement creates a rather interesting legal vacuum. The plaintiff's claim is barred by the statute of limitations, but the defendants have acquired no rights. Since surface water is regarded as a common enemy under Indiana law,[86] there is authority for the position that the plaintiff could use self-help to block the flow of the water by the erection of a dam or barricade.[87]

Indiana has an interesting statute which creates a method of establishing a public highway by use, independent of common law dedication or strict prescription.[88] Unlike the doctrine of prescriptive use, it is not essential to prove that the use of the road by the public was under a claim of right.[89] In *Fenley Farms, Inc. v. Clark*,[90] the defendants owned a five-acre tract of land fronting the Ohio River. The plaintiff owned land which bordered the defendants' property and which prevented access to Westport Road. Both tracts of land and other riverfront parcels were originally part of a single tract, known as the Bowyer tract. Without notifying or obtaining permission from the plaintiff, the defendants bulldozed a road from Westport Road across the plaintiff's property to the defendants' property. The plaintiff filed suit for trespass and sought an injunction. The trial court granted judgment for the defendants and the plaintiff appealed. The evidence established that a road existed from 1852 until 1874 between Westport Road and a ferry landing. The road was

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[83]*Id.* at 192.

[84]*Id.*

[85]*Id.* at 190-91.

[86]Capes v. Barger, 123 Ind. App. 212, 109 N.E.2d 725 (1953).

[87]Clay v. Pittsburgh, C., C. & St. L. Ry., 164 Ind. 439, 73 N.E. 904 (1905); Cairo & V.R.R. v. Stevens, 73 Ind. 278 (1881); Taylor v. Fickas, 64 Ind. 167 (1878). *See also* Polston, *Property, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 297, 307-08 (1976).

[88]IND. CODE § 8-20-1-15 (1976).

[89]Cozy Home Realty Co. v. Ralston, 214 Ind. 149, 14 N.E.2d 917 (1938).

[90]404 N.E.2d 1164 (Ind. Ct. App. 1980).

used sporadically in subsequent years, primarily by the owners of the various riverfront tracts. The parties stipulated that during the past thirty-five years, the road had been used by the defendants, their immediate predecessors in title and other owners of riverfront lots carved from the Bowyer tract.[91] Plaintiff argued that the earlier use of the road to reach the ferry was not a use by the general public under a claim of right, but was a use by customers of a private commercial enterprise. The plaintiff claimed that even if a roadway had existed at one time, it had since been abandoned.[92] The court rejected these arguments, noting that "public" means "'all those who have occasion to use' the road,"[93] and that use of the road by employees and customers of a private enterprise was a public use.[94] The fact that the highway was rarely if ever used by persons other than landowners did not make it less a public road. Even if the road is open only at one end or extends only to one person's property, it is still a public road. Moreover, the continued use of the road by the owners of the riverfront lots was sufficient to negate a claim of abandonment.[95] Likewise, the court noted that it was immaterial under the statute whether the use was with the consent of or over the objection of the landowner. Unlike a prescriptive easement, adverse use was not essential.[96]

The statute also requires that the party alleging a public highway has the burden of proving its exact location, width, and description. Fortunately, at the time the Bowyer land was partitioned among the defendant's heirs, there was a partition plat in a probate order book which showed the location of the road. There was evidence that the roadbed was visible before the bulldozing and that the bulldozed road did not deviate from the existing roadbed.[97]

Unlike easements, restrictive covenants are enforced in equity, and equity may refuse to enforce such covenants where changed conditions in the restricted area have significantly reduced or eliminated any benefits sought to be realized by the enforcement of the covenant.[98] In *Cunningham v. Hiles*,[99] the Board of Trustees of the town of Schererville approved the rezoning of a tract of land in a

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[91]*Id.* at 1167-68.

[92]*Id.* at 1168.

[93]*Id.*

[94]*Id.*

[95]*Id.* at 1170.

[96]*Id.* at 1168-69.

[97]*Id.* at 1170-71.

[98]Bob Layne Contractor, Inc. v. Buennagel, 158 Ind. App. 43, 301 N.E.2d 671 (1973); 2 A.L.P., *supra* note 17, § 9.39; 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 684 (1980).

[99]395 N.E.2d 851 (Ind. Ct. App. 1979).

subdivision from residential to commercial use; the tract had been subject to a covenant restricting land use to residential purposes. Individual defendants purchased one of the lots affected and employed a general contractor to begin construction of a music store on the lot. Homeowners in the subdivision brought an action against the city to challenge the propriety of the zoning reclassification and against the individual defendants to enjoin the construction of the music store. The trial court entered judgment for both the town and the individual defendants finding that the restrictive covenant was unenforceable. The homeowners appealed.[100] In reversing the trial court's determination, the court of appeals did not address the propriety of the zoning reclassification. Rezoning of an area subject to a valid restrictive covenant will not relieve that area of the burdens of the covenant.[101] The court noted that the only change within the restricted area was the permitted construction of an office building which protruded approximately 112 feet into the subdivision at its northeast corner. There had been a substantial increase in commercial activities in the areas surrounding the subdivision, and the traffic had increased eight to ten times on U.S. 30, which bordered the subdivision on one side.[102] However, the court reasoned that "the weight attributed to these changes should not be as great as that accorded changes which have occurred within the restricted area."[103] Similarly, the court gave little weight to the fact that the vacant lots bordering U.S. 30 no longer attracted residential buyers due to the traffic load. Courts have come to realize that changes outside a restricted area may reduce the benefit of the covenant to perimeter lot owners, but to release them from the burden would destroy the benefit to the interior lot owners and eventually erode the benefit to the entire area.[104] To make a restrictive covenant unenforceable, the changes which have occurred in and around the restricted area must be so radical in nature that the purpose of the covenant has been defeated.[105]

While the appeal was pending, the individual defendants proceeded to construct the music store, and subsequently one of the defendants, Hiles, filed a petition for rehearing claiming that a material change in circumstances had rendered the appeal moot.[106] While not entirely convinced that Hiles had the right to proceed

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[100]*Id.* at 853.

[101]Capp v. Lindenberg, 242 Ind. 423, 433, 178 N.E.2d 736, 740 (1961).

[102]395 N.E.2d at 854.

[103]*Id.* at 855.

[104]5 R. POWELL, *supra* note 98, ¶ 684; 2 A.L.P., *supra* note 17, § 9.39.

[105]395 N.E.2d at 856.

[106]Cunningham v. Hiles, 402 N.E.2d 17 (Ind. Ct. App. 1980).

with the construction because the homeowners had failed to file a supersedeas bond,[107] the court resolved the issue on the failure to notify the court of the construction during the appeal. The court stated, "A Petition for Rehearing will not be granted on the basis of acts which occurred during the pendency of the appeal and which were not in any manner presented for this Court's consideration."[108] Graciously, the court did not feel required to modify its order to require the removal of the building but instead directed the circuit court to issue a permanent injunction against the use of the structure for any purpose which volated the terms of the covenant.[109] No doubt the structure will make an impressive, though unique, residence for some lucky homeowner.

Another case involving the enforceability of covenants was *Brendonwood Common v. Franklin*.[110] In August, 1917, a 350 acre tract of land was platted as Brendonwood, "a self-regulated residential zone."[111] The addition consisted of 110 lots with various private roadways and paths, and one public road. In September, 1917, the entire property was conveyed to Charles Lewis. The deed contained the Brendonwood covenants.[112] The grantee was required to organize Brendonwood Common as a corporation, to convey all common areas exclusive of the 110 lots to the corporation,

> to provide for 110 memberships in the corporation with each membership appurtenant to one of the 110 lots and transferable only to successive purchasers of each lot, and to cause the corporation's articles and bylaws to provide for a system of rules and regulations permitting the assessment and collection of charges against each [lot] owner for the maintenance, care and protection of the common areas.[113]

The deed provided that these covenants, stipulations, and agreements were to have the effect of a covenant running with the land and would bind the grantee, his heirs and assignees.[114] The corporation was organized, and its articles and bylaws provided for the maintenance charges to be levied against each property owner, enforceable as liens against their properties. The bylaws further provided that assessments for maintenance, as well as development and improvement charges, would be paid by the owners on an acreage

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[107] *Id.* at 21 n.4.
[108] *Id.* at 21.
[109] *Id.* at 22.
[110] 403 N.E.2d 1136 (Ind. Ct. App. 1980).
[111] *Id.* at 1138.
[112] *Id.*
[113] *Id.*
[114] *Id.*

basis, and in the event of default in payment, the lien on the properties might be foreclosed.[115] In 1974, Brendonwood Common levied a special roadway assessment against the lot owners on an acreage basis. A group of lot owners on the south boundary of Brendonwood refused to pay the special assessment, and several refused to pay other regular assessments.[116] Brendonwood Common filed suit to collect these delinquent assessments with interest and attorney's fees, and sought a foreclosure order to sell the defendants' properties. The defendants filed a cross petition asking the court to declare the covenants unenforceable as to their properties.[117] The trial court held that the covenants were no longer enforceable because of changed circumstances; Brendonwood Common appealed.[118] The court of appeals noted the following changed conditions: (1) the addition was now part of Indianapolis; (2) the roads were paved rather than dirt and gravel; (3) the cost of maintenance had increased; and (4) certain common areas had been turned over to a private country club whose membership did not include all members of the corporation. The court concluded, however, that these changes were not so radical in nature as to defeat the original purpose of the covenant.[119] The appellees argued that while the "changed condition" standard as applied to restrictive covenants might not justify relief, these were affirmative covenants which imposed positive burdens or affirmative duties.[120] Thus, because the defendants owned larger lots, which bordered on a public road, they would pay a greater portion of the costs of maintaining the private roads than owners of smaller interior lots who used those roads, but would receive little or no advantage from such maintenance. While the court conceded that this argument was of some relevance, it noted that most commentators and courts rarely make a distinction between negative and affirmative covenants.[121]

In response to the defendants' argument that the covenants did not run with the land, the court noted that affirmative covenants may run with the land if that was the intention of the grantor and if the covenants touch and concern the land.[122] Although the defendants' contention was unclear, it may have been based on the fact

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[115] *Id.* at 1139.

[116] *Id.* at 1137-40.

[117] *Id.* at 1137-38.

[118] *Id.* at 1140.

[119] *Id.*

[120] *Id.* at 1140 n.4.

[121] *Id.*

[122] *Id.* at 1141. There was reference to a subsequent quitclaim deed from the grantor of the September 1917 deed to the grantee, but the court concluded that it was ineffective to extinguish the covenants. *Id.*

that the affirmative duties were created by the bylaws of the subsequently formed corporation rather than by the deed itself. On the other hand, the deed did require the grantee to establish the corporation and to ensure that the articles and bylaws provided for the assessments and collection of charges against each owner for the maintenance of Brendonwood.

With regard to the defendants' argument that they were no longer members of Brendonwood Common, the court noted that membership was transferable only by sale of the lot to which the membership was appurtenant. Thus, the letters sent to the corporation notifying it of the defendants' withdrawal were ineffective. Only a sale of their properties would be sufficient to extinguish their obligation to pay the fees.[123]

Finally, the court concluded that the provisions in the bylaws making the assessments a lien on the properties and providing for foreclosure "with interest, attorney's fees and costs,"[124] were contractual provisions binding on all members.[125] This conclusion assumed that a purchaser of one of the 110 lots would automatically become a member of the corporation and would be bound by its articles and bylaws. This point relates to the previous discussion of covenants running with the land.[126] The purchaser would be on constructive notice of these provisions in his chain of title because the 1917 deed required the grantee to form the corporation and provide for 110 memberships with each membership appurtenant to one of the 110 lots.

D. Landlord and Tenant Relations

At common law, if a person enters into possession of land with the owner's permission and without any agreement to pay rent, it is referred to as a tenancy at will—a tenancy terminable at the will of either party.[127] If a tenant under a lease holds over at the expiration of the term, it is referred to as a tenancy at sufferance.[128] In *Wallace*

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[123]*Id.* at 1142-43.

[124]*Id.* at 1143.

[125]Had the court continued to treat the promise to pay interest, attorney's fees, and costs as a covenant running with the land, there would have been a problem with the requirement that the promise must "touch and concern" the land. In Levin v. Munk, 97 Ind. App. 118, 169 N.E. 82 (1929), the court refused to allow a landlord reasonable attorney's fees and interest on past due rent, as provided for in the lease from the tenant's assignee, because these promises were merely collateral and in no manner touched or concerned the land. *Id.* at 122, 169 N.E. at 83.

[126]*See* text accompanying note 122 *supra*.

[127]W. BURDY, *supra* note 76, 125-27.

[128]*Id.* at 127-28; J. CRIBBET, *supra* note 76, 56.

v. Rogier,[129] the Indiana Court of Appeals noted that if a person was using or living on another's land with permission but was not paying rent, the term "tenancy at sufferance" was to be used to describe the relationship.[130] By statute a "tenancy at will" cannot arise or be created without an express contract,[131] and once created, one month's notice in writing is required to terminate it.[132] Thus, the statute has changed the common law use of the term "tenancy at will" and has forced the court to use the term "tenancy at sufferance" to describe the relationship. This change of labels, however, does not alter the substantive law governing the relationship.

In *Wallace*, Mrs. Rogier brought an action for damages and ejectment against her daughter and son-in-law, the Wallaces, who with permission had taken possession of the land in the expectation of successfully negotiating a contract for the sale of the land. The Wallaces countersued for specific performance of a land sales contract signed by the Rogiers, but the court found that the "paper" was a sham contract signed for the purpose of obtaining mortgage approval.[133] The trial court granted injunctive relief and awarded the mother $1,000 in damages for wrongful possession.[134] The court of appeals reversed on the damage issue, noting that neither the length of time the Wallaces wrongfully possessed the land nor the rental value of the land had been established.[135] The court of appeals also noted that the measure of damages for the loss of use of land is the rental value of the land for the period of wrongful possession.[136]

The question of damages for wrongful possession by a holdover tenant was raised in *Brummett v. Pilotte*.[137] In the fall of 1972 the landlord served a written notice to quit on the tenant, who was previously under an oral year-to-year farm lease.[138] The tenant refused to vacate and the landlord brought an action for ejectment. The trial court entered judgment ejecting the tenant; the tenant appealed and remained in possession until February 1974 after posting a supersedeas bond which was approved by the trial court.[139] In August 1975, the court of appeals affirmed the judgment of ejection,[140] and

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[129]395 N.E.2d 297 (Ind. Ct. App. 1979).

[130]Carger v. Fee, 140 Ind. 572, 39 N.E. 93 (1894).

[131]IND. CODE § 32-7-1-2 (1976).

[132]IND. CODE § 32-7-1-1 (1976). Compare IND. CODE § 32-7-1-7 (1976), where tenancy at sufferance is terminated.

[133]395 N.E.2d at 299.

[134]*Id.*

[135]*Id.* at 300.

[136]*Id.*

[137]390 N.E.2d 705 (Ind. Ct. App. 1979).

[138]Pilotte v. Brummett, 116 Ind. App. 403, 332 N.E.2d 834 (1975).

[139]390 N.E.2d at 706.

[140]332 N.E.2d at 834.

the landlord brought the present action to recover damages on the bond. The trial court awarded the landlord one-half the sale price of the crop grown during pendency of the appeal, which was the rent called for by the prior agreement; attorney's fees; the cost of weed control measures; and the value of deprivation of use of the farm residence, less certain farm expenses.[141] The landlord appealed, claiming that she should have been awarded the value of the crops grown after the date of the judgment since she prevailed in the prior appeal.[142] The court noted that neither Trial Rule 62, which provides guidelines for determining the size of the bond, nor Indiana case law was conclusive on the elements of damages.[143]

The court distinguished *McCaslin v. State*,[144] in which it was held that the landlord was entitled to the crops planted after an action in ejectment was commenced. *McCaslin* did not, however, involve a tenant who remained in possession under a bond pending an appeal. Similarly, the court did not consider *Sherry v. State Bank*[145] to be controlling. In *Sherry* a tenant farmer who remained in possession of the land during the pendency of an appeal was liable for mesne profits. The court noted, however, that "mesne profits" is a tool of equity to be applied in an equitable manner.[146]

The court cited authority suggesting that casting title to crops upon whomever might prevail in an action to determine title or continued right to possession of land would unnecessarily interfere with the cultivation of agricultural lands, an activity which ought to be encouraged notwithstanding the pendency of a bona fide controversy.[147] Thus, the court concluded that the tenant was liable for the rental value of the farm from the date of the judgment until surrender of possession, but not for the entire product of the farm.[148]

Three cases decided during this survey period exemplify the difficulty inherent in the drafting of leases. In *Shahan v. Brinegar*,[149] the court was faced with the task of interpreting the provisions of a complex commercial lease. Three separate instruments were ex-

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[141]390 N.E.2d at 706.

[142]*Id.* at 707.

[143]*Id.*

[144]99 Ind. 428 (1885).

[145]6 Ind. 397 (1855).

[146]390 N.E.2d at 707.

[147]Annot., 113 A.L.R. 1059 (1938); Annot., 95 A.L.R. 1127 (1935). The court quoted from Woodcock v. Carlson, 41 Minn. 542, 43 N.W. 479 (1889), which held that the tenant should be liable for either rent or crops, but not both. To hold the tenant liable during an appeal for crops personally produced would make the appeal of doubtful value.

[148]390 N.E.2d at 708.

[149]390 N.E.2d 1036 (Ind. Ct. App. 1979).

ecuted on December 7, 1973: (1) a contract for the sale of tavern equipment and the contents of the leased premises; (2) an agreement that the lessee was to serve as sole and exclusive manager of the tavern as of December 17, 1973,[150] and (3) a lease of the tavern for a term of five years ending December 17, 1978, at a rental rate of $500 per month "beginning February 5, 1974."[151] Three separate interpretation problems were presented to the court.

The first problem involved the date on which the lessee became liable for rent under the lease. The court, noting that writings executed at the same time and relating to the same transaction or subject matter are construed together in determining the contract, concluded that the rental provision was ambiguous, and that, considering the surrounding circumstances existing when the lease was executed, the trial court was justified in finding that the lessee was liable for rents during December 1973 and January 1974.[152]

A second problem involved the interpretation of an arbitration agreement contained in the lease.[153] The lessee argued that the provision made arbitration a condition precedent to the initiation of a suit. The court rejected this view, holding that a trial court is required to order the parties to proceed to arbitration only upon the application of one of the parties. There was no showing that either party made such a request.[154]

The third problem involved a ninety-day grace period on rental arrearage. The lessee claimed that he must be in arrears for three months before he is in breach of the lease, whereas the lessor maintained that the ninety days referred not to the amount of rent owed, but to the amount of time the rent was overdue. The court found that the ordinary interpretation of a ninety-day grace period would grant the lessee ninety days from the date payment was due within which to make his payments current.[155] The court found that the lessee had exceeded the ninety-day grace period as to the rent for December 1973, January 1974, and October 1975. Nevertheless, the court found that the landlord had not made a demand for the overdue rent until October 4, 1976, and that the provision in the lease

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[150]*Id.* at 1038.

[151]*Id.* at 1042.

[152]*Id.*

[153]"In the event a dispute should arise between the parties hereto, each party agrees to submit the dispute to arbitration under the rules of the American Arbitration Association." *Id.* at 1040 n.1.

[154]The lessee did not formally request arbitration until page 14 of the lessee's brief. *Id.* at 1040 n.2.

[155]*Id.* at 1043.

for eight percent per annum interest on such accumulated arrearage must be computed from the date of the demand.[156]

In *Unishops, Inc. v. May's Family Centers, Inc.*,[157] the court was presented with the interpretation of a covenant not to compete. The lessee (licensee) entered into two licensing agreements to operate certain departments in all of May's stores. Both licenses contained a provision that during the life of the agreement the licensee would not engage in a business or operate a department similar to that being conducted under the agreement, within a radius of five miles of any May's store, without the written consent of the licensor, "which consent shall not unreasonably be withheld."[158] The covenant further provided that "[a] violation of this provision shall permit the Licensor to cancel this License Agreement with respect to all stores, upon sixty (60) days prior written notice to the Licensee."[159] Without consulting the Licensor, Unishops began negotiations to operate similar departments in a Tradeway store located 4.42 miles from one of May's stores and 4.43 miles from another. As soon as May's learned of the negotiations, they advised Unishops that they would not consent to such a venture. Nevertheless, Unishops entered into three licensing agreements with Tradeway and May's filed this action seeking injunctive relief.[160]

In discussing the enforcement of a restrictive covenant, the court noted that injunctive relief to prevent a breach will be granted "if the restraint is reasonable with respect to the parties involved and the public interest."[161] Citing *Donahue v. Permacel Tape Corp.*,[162] the court used a three-pronged test to determine reasonableness: (1) the scope of the promise in its protection of the covenantee; (2) the effect of the promise upon the covenantor; and (3) the effect of the covenant upon the public interest.[163] The court noted that because Unishops was intimately associated with May's inside operation, it could observe May's advertising programs, marketing policies, purchasing and pricing strategies, and customer lists.[164] Moreover, the effect upon Unishops was not unreasonable; the re-

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[156]*Id.* at 1042-43. There is nothing in the portion of the lease set forth in the decision which would require the landlord to make a demand for overdue rent.

[157]399 N.E.2d 760 (Ind. Ct. App. 1980).

[158]*Id.* at 762.

[159]*Id.*

[160]*Id.*

[161]*Id.* at 763.

[162]234 Ind. 398, 127 N.E.2d 235 (1955).

[163]399 N.E.2d at 763.

[164]*Id.* The evidence at the trial indicated that there was a striking similarity between May's advertising and the initial advertising of the opening of the Tradeway store. *Id.*

striction was limited to a five-mile area, to the life of the license agreement, and to similar activities.[165] Thus, the imposition of the restriction upon the covenantee's liberty or business activity did not contravene public policy.

Unishops argued that the covenant contained an adequate legal remedy, termination of the license.[166] The court rejected this argument: "In order to be adequate, a legal remedy must be as practicable, efficient and adequate as that afforded by equity."[167] Unishops' contention that the termination clause was a liquidated damages provision was not addressed by the court because it was neither raised at trial nor in the motion to correct errors. Finally, Unishops argued that consent to the proposed license agreement with Tradeway was withheld contrary to the clause which provided that "consent shall not be unreasonably withheld."[168] The argument was based partly upon May's anticipatory refusal. However, the court found that May's refusal, without a formal request by Unishops, was not unreasonable.[169] In fact, such notice to Unishops was expeditious and designed to prevent "Unishops costly involvement with Tradeway had they but heeded the letter"[170] informing them of the covenant violation. Unishops also emphasized that the Tradeway store was located at the "outer fringe" of the five mile radius. The court, however, did not find the argument, that the "greater the distance the more unreasonable the refusal," persuasive.

In *Piskorowski v. Shell Oil Co.*,[171] Shell entered into an agreement with Piskorowski on August 31, 1965, to lease property in Hammond, Indiana for a term of ten years. In January 1967, Shell notified the plaintiff that it was terminating the lease effective May 1, 1967, under the auspices of the termination provision of the lease. The plaintiff filed suit for breach of contract and the trial court granted lessee's motion for a summary judgment. On appeal, the plaintiff argued that there was a material issue of fact whether the parties intended the termination provisions to give Shell the unilateral power to terminate the lease at any time for any reason.[172] Article 13 of the lease agreement, set forth in its entirety in the opinion, ended by saying: "*Shell may terminate this Lease at any*

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[165]*Id.* at 764.

[166]*Id.*

[167]*Id.* at 765 (quoting Fisher v. Carey, 67 Ind. App. 438, 442, 119 N.E. 376, 377 (1918)).

[168]399 N.E.2d at 765.

[169]*Id.* at 766.

[170]*Id.*

[171]403 N.E.2d 838 (Ind. Ct. App. 1980).

[172]*Id.* at 843.

time by giving Lessor at least ninety (90) days' notice."[173] Apart from this last sentence, the clause dealt with notice requirements and a rent abatement scheme which Shell could have invoked if, due to the occurrence of certain contingencies, use of the premises as a service station facility was impaired.[174] The plaintiff maintained that Shell's inclusion of the unconditional termination provision in the last sentence of an article otherwise devoted to conditional termination powers and procedures, rendered the article ambiguous, misleading and confusing. The court rejected this contention.[175] The court also rejected the argument that a literal interpretation of the last sentence would make the remainder of the article meaningless.[176] In distinguishing the notice requirements,[177] the court noted that Shell could terminate upon the happening of one of the contingencies with only thirty days notice, whereas at least ninety days notice was required before Shell could unilaterally terminate. Similarly, the court refused to construe the contract against the author of the document because without ambiguity, there was nothing to construe.[178] Unfortunately, the plaintiff's best argument, illegality, was not addressed by the court because the plaintiff never raised the issue.[179] Had the issue been raised, the court might have found the contract unconscionable and oppressive,[180] based upon the unequal bargaining power between the plaintiff and Shell.

It has long been recognized that a landlord has a duty to maintain and repair common areas or areas over which he retains control.[181] However, in *Purcell v. English*,[182] decided in 1882, the Indiana Supreme Court held that this duty did not extend to temporary unsafe conditions caused by the accumulation of ice and snow.

In *Rossow v. Jones*,[183] the plaintiff, a tenant in a three-apartment dwelling, was injured when he slipped and fell on the steps leading from a porch to the sidewalk. All of the apartments exited onto the porch, which was a common area under the landlord's control. At the time of the injury the steps were covered with a natural ac-

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[173]*Id.*

[174]*Id.*

[175]*Id.* at 844-45.

[176]*Id.* at 845.

[177]*Id.*

[178]*Id.* at 846.

[179]*Id.* at 847.

[180]*See* Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971); Annot., 49 A.L.R. 3d 306 (1971).

[181]*See* discussion in Rossow v. Jones, 404 N.E.2d 12, 15-16 (Ind. Ct. App. 1980) (concurring opinion).

[182]86 Ind. 34 (1882).

[183]404 N.E.2d 12 (Ind. Ct. App. 1980).

cumulation of ice and snow. Although snow shovels and a box of salt were available for cleaning the entryway, they had been locked away by the landlord. It was still light enough to see when the plaintiff, wearing leather boots with rubber soles, attempted to descend the stairs, steadying himself with a hand on the porch column. There had been a handrail along the steps from the porch to the walk, but the landlord had removed it.[184] The plaintiff filed suit for personal injuries in a small claims court and recovered a judgment of $2500. The landlord appealed, claiming that he had breached no duty and that the tenant was guilty of contributory negligence.[185] The court reviewed a number of Indiana decisions which have held the landlord liable to a tenant for injuries caused by defective conditions existing in areas under the landlord's control, and concluded: "From these authorities . . . a landlord does have a duty of reasonable care that the common ways and areas, or areas over which he has reserved control are reasonably fit and that hazards created through natural accumulation of ice and snow are not beyond the purview of that duty."[186] The court also concluded that the plaintiff was not guilty of contributory negligence in using the steps for ingress and egress.[187]

In a concurring opinion, Judge Staton noted that one fourth of Indiana's population now resides in rental housing,[188] and many tenants are unequipped to perform the tasks of snow and ice removal.[189] As to the incurred risk-contributory negligence issue, Judge Staton found it difficult to understand how the majority could state that the fact-finder could have found Jones guilty of contributory negligence.[190]

One can envision the tenant faced with the unpleasant alternative of either slowly starving to death in his lonely apartment because the landlord has not provided him with a safe means of ingress and egress or of being without a legal remedy because he has incurred the risk if he attempts to leave and sustains personal injury. In fact, this argument, that the tenant must either abandon the apartment or incur the risk, was rejected in *Coleman v. DeMoss*.[191] The landlord cannot be allowed to constructively evict a tenant by failing to provide him with a safe means of ingress and egress, and

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[184]*Id.* at 14.

[185]*Id.* at 13.

[186]*Id.* at 14.

[187]*Id.*

[188]*Id.* at 15 (Staton, J., concurring).

[189]Some tenants lack physical ability to perform the task; others lack storage space for the equipment necessary to perform the task.

[190]*Id.* at 17.

[191]144 Ind. App. 408, 246 N.E.2d 483 (1969).

conversely the tenant's refusal to abandon the apartment cannot as a matter of law be considered an assumption of the risk.[192]

E. Real Estate Transactions

Section Four of the English Statute of Frauds provides that no action may be brought on any contract for the sale of land unless the contract or some memorandum of it is in writing and signed by the party to be charged or his authorized agent.[193] The Indiana statute of frauds, based on the English model, contains a similar provision.[194] While the English Statute of Frauds made oral contracts for the sale of land unenforceable, only twenty-three years after enacting that statute, the House of Lords enforced an oral contract for the sale of land under the doctrine of part performance.[195] All but four American jurisdictions now hold that an act of part performance by the purchaser will remove the contract from the Statute of Frauds.[196] There are at least four views on what acts of part performance by the purchaser are sufficient,[197] but possession of the land by the purchaser under the oral contract is one of the necessary conditions under all four views.[198] Indiana decisions clearly re-

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[192]*Id.* at 418-19, 246 N.E.2d at 488.

[193]Statute of Frauds, 1677, 29 Car. 2, c.3, § 4.

[194]"No action shall be brought in any of the following cases: . . . Fourth. Upon any contract for the sale of lands[,] . . . [u]nless the promise, contract, or agreement . . . shall be in writing, and signed by the party to be charged therewith." IND. CODE § 32-2-1-1 (1976).

[195]Lester v. Foxcroft, Colles Cases 108, 1 Eng. Rep. 205 (H.L. 1700). Indiana recognized the doctrine of part performance as early as 1820. Tibbs v. Barker, 1 Blackf. 58 (1820).

[196]Kentucky, Mississippi, North Carolina and Tennessee hold that no act of part performance will remove an oral contract for the sale of land from the Statute of Frauds. *See* 2 A. CORBIN, CORBIN ON CONTRACTS § 443 (1950 & Supp. 1971) and cases cited therein.

[197]These views are that: (1) possession alone is sufficient; (2) possession must be accompanied by payment [of all or part of the consideration]; (3) possession must be accompanied by the making of valuable and lasting improvements; and (4) there must be both possession and such change of position by the purchaser that irreparable injury will result unless the oral contract is enforced.

3 A.L.P., *supra* note 17, § 11.7. For the various state views see 3 A.L.P., *supra* note 17, § 11.7-.12; 2 A. CORBIN, *supra* note 196, §§ 420-443. A fifth view is that no acts of part performance will be recognized.

[198]Horner v. McConnell, 158 Ind. 280, 63 N.E. 472 (1902); St. Joseph Hydraulic Co. v. Globe Tissue Paper Co., 156 Ind. 665, 59 N.E. 995 (1901) (possession and such change of position that irreparable injury will result sufficient); Johnson v. Pontious, 118 Ind. 270, 20 N.E. 792 (1889) (possession and payment of the purchase price sufficient); Neal v. Neal, 69 Ind. 419 (1880) (possession sufficient).

quire possession by the purchaser as a necessary element for the application of the doctrine of part performance.[199]

In *Dupont Feedmill Corp. v. Standard Supply Corp.*,[200] the court of appeals apparently departed from the traditional view regarding enforcement of oral contracts for the sale of land. Dupont sued Standard for specific performance of an alleged oral agreement for the sale of land. Although Dupont had tendered a down payment and the parties had discussed a written contract, no contract was ever signed. The down payment was returned, and the property was sold to a third party.[201] The trial court granted the defendant's motion for a summary judgment; yet, none of the traditional acts required for enforcement of the contract under the doctrine of part performance existed. The court of appeals reversed. Even though there was no part performance, the court suggested that the contract might still be enforced under the doctrine of equitable estoppel.[202] In a counter-affidavit filed by Dupont on the motion for summary judgment, Dupont indicated that it had obtained a mortgage in reliance on the contract. It claimed that if the transaction were not completed, its credibility would be shaken, thereby adversely affecting future banking relations.[203] The court determined that this detrimental reliance raised a factual issue regarding the enforceability of the contract.[204] The trial court agreed with Standard that to remove a contract from the Statute of Frauds under the doctrine of equitable estoppel, it was necessary for Dupont to prove a false representation or concealment of a material fact.[205] The court of appeals, however, held that a finding of actual fraud was not required to use equitable estoppel or promissory estoppel to defeat the Statute of Frauds.[206]

In *Billman v. Hensel*,[207] the court of appeals was again presented with the troublesome "subject to financing" clause in a real estate

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[199]Swales v. Jackson, 126 Ind. 282, 26 N.E. 62 (1890); Wallace v. Long, 105 Ind. 522, 5 N.E. 666 (1886); Genda v. Hall, 129 Ind. App. 643, 154 N.E.2d 527 (1958).

[200]395 N.E.2d 808 (Ind. Ct. App. 1979).

[201]*Id.* at 810.

[202]*Id.* at 811.

[203]*Id.*

[204]*Id.*

[205]*Id.* This view is supported by language in earlier Indiana decisions which discuss the doctrine of equitable estoppel. Blake v. Hosford, 387 N.E.2d 1335 (Ind. Ct. App. 1979); Modisett v. Jolly, 153 Ind. App. 173, 286 N.E.2d 675 (1972); Hurd v. Ball, 128 Ind. App. 278, 143 N.E.2d 458 (1957).

[206]*Id.* The court of appeals is correct in holding that actual fraud is not an element of the doctrine of equitable estoppel. 3 S. WILLISTON, A TREATISE OF THE LAW OF CONTRACTS § 533(A) (3d ed. 1960); 2 A. CORBIN, *supra* note 196, § 422(a); J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 735-38 (2d ed. 1977).

[207]391 N.E.2d 671 (Ind. Ct. App. 1979).

contract. The contract provided that the sale was conditioned upon the purchaser's ability to obtain a conventional mortgage for not less than $35,000.[208] The purchaser approached only one financial institution and made no formal loan application. In an action by the purchaser to recover his $1,000 earnest money deposit, the trial court entered judgment for the vendor.[209] In affirming, the court of appeals relied on the better view, that a "subject to financing" clause imposes upon the purchaser an implied obligation to make a reasonable and good faith effort to obtain financing.[210] An earlier case, *Blakley v. Currence*,[211] contains language suggesting that a "subject to loan approval" clause does not require the purchaser to make a good faith effort to obtain a loan.[212] The court in *Billman* noted that the two cases are distinguishable since the wording of the finance clause, "subject to loan approval," in the *Blakley* case was not conditioned upon the purchaser's ability to obtain financing.[213] The court suggested that had the words "subject to purchaser's ability to obtain financing" been included, a good faith effort would have been required.[214] Nevertheless, the court expressed the belief that "the rule in *Blakley* should be limited to the facts there present."[215]

In *Staley v. Stephens*,[216] Stephens refused to complete a contract to purchase Staley's residential property. The seller sued to recover the purchase price, and the buyer counterclaimed for damages for failure to tender marketable title.[217] A house, located on the property 8.4 feet from the side property line, was part of a subdivision which was subject to a restrictive covenant requiring a ten foot side line setback. A town zoning ordinance, which was incorporated by reference into the covenant, required an 8.5 foot setback.[218] There was some question as to which requirement controlled,[219] but in any case, the house was in violation of one or both.[220] The court of appeals affirmed the trial court's finding that the title was unmarket-

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[208] *Id.* at 672.
[209] *Id.*
[210] *Id.* at 673.
[211] 361 N.E.2d 921 (Ind. Ct. App. 1977).
[212] *Id.*
[213] 391 N.E.2d at 673.
[214] *Id.*
[215] *Id.*
[216] 404 N.E.2d 633 (Ind. Ct. App. 1980).
[217] *Id.* at 634.
[218] *Id.*
[219] *Id.* at 635.
[220] *Id.*

able and that the buyer would not be forced to accept an unmarketable title no matter how small the defect.[221]

While one might be tempted to criticize the court's refusal to grant specific performance because the defect in title was trivial, a recent court of appeals decision, *Metropolitan Development Commission of Marion County v. Douglas*,[222] should be noted. There, the defendant was forced to remove his carport which was 2.2 feet from an adjacent side property line; a zoning ordinance required a five foot side yard. Although the affected property owner waived the deviation in the setback,[223] the court stated that "zoning violations may be enjoined without regard to the degree of noncompliance."[224] Strict compliance, not substantial compliance, with the zoning law is required.[225] The court noted that the proper remedy for zoning violations was injunctive relief provided for by statute.[226]

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[221] *Id.* at 636.

[222] 390 N.E.2d 663 (Ind. Ct. App. 1979).

[223] *Id.* at 666.

[224] *Id.*

[225] *Id.*

[226] *Id.* at 664 n.3. *See* IND. CODE § 18-7-2-84.1 (1976).

XV. Secured Transactions & Creditors' Rights

R. Bruce Townsend*

Over fifty cases involving serious problems of secured transactions and creditors' rights were decided by the Indiana appellate courts last year. Most concern complex fact situations and difficult questions of law. Fourteen dealt with substantially new and previously unresolved interpretations of the mechanics' lien statute.[1] Outstanding opinions dealt with the obligations of debtors transferring lien property;[2] the risks of a secured party using self help after declaring a premature default;[3] the duty of a mechanic asserting a lien to give timely notice to the owner of homestead property;[4] the effect of recording notice of intent to claim a mechanics' lien on entireties property by naming one spouse;[5] and an assortment of problems illustrating the versatility of proceedings supplemental as a remedy for reaching assets of the debtor.[6] Two decisons resolved important matters of policy which, in the opinion of this writer, deserve careful reconsideration. In one, the Indiana Supreme Court[7] determined that an installment support order was not a "judgment," thereby requiring delinquencies to be liquidated by a new action before enforcement and application of the fifteen year statute of limitations to such proceedings. The effect will be to place an unreasonable burden on divorcees with children and to allow delinquent orders to fester for an unreasonable length of time. The other decision, from the court of appeals,[8] has the effect of discouraging

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[1]These cases are discussed in the text accompanying notes 85-141 *infra*.

[2]Boswell v. Lyon, 401 N.E.2d 735 (Ind. Ct. App. 1980), *discussed in* text accompanying notes 45-47 *infra*.

[3]Van Bibber v. Norris, 404 N.E.2d 1365 (Ind. Ct. App. 1980), *discussed in* text accompanying notes 67-74 *infra*.

[4]Mid-America Homes v. Horn, 396 N.E.2d 879 (Ind. 1979). This and another excellent decision on the problem are discussed in the text accompanying notes 117-125 *infra*.

[5]Beneficial Fin. Co. v. Wegmiller Bender Lumber Co., 402 N.E.2d 41 (Ind. Ct. App.), *rehearing denied*, 403 N.E.2d 1150 (Ind. Ct. App. 1980). This case is discussed in the text accompanying notes 104-07 *infra*.

[6]At least five excellent decisions in this category will be found at notes 153-68 and accompanying text.

[7]Kuhn v. Kuhn, 402 N.E.2d 989 (Ind. 1980), *vacating and remanding* 389 N.E.2d 319 (Ind. Ct. App. 1979). The case is discussed in text accompanying notes 173-82 *infra*.

[8]Beneficial Fin. Co. v. Wegmiller Bender Lumber Co., 402 N.E.2d 41 (Ind. Ct. App.), *rehearing denied*, 403 N.E.2d 1150 (Ind. Ct. App. 1980). The case is discussed in text accompanying notes 114-16 *infra*.

lenders from making loans to assist an owner in financial difficulty on a construction project. This questionable result was achieved by subordinating a mortgage lender whose funds were applied to pay off mechanics' liens to other mechanics on the project who were not paid.

New legislation[9] expanded the Indiana exemption law and replaced an alternative exemption allowed under the Bankruptcy Code of 1978.

A. Secured Transactions

1. Formalities in Creation—Mortgages and Conditional Sales Contracts of Real Estate.—Ordinarily a conveyance must be in writing, signed by the grantor, describe the property and contain words of grant. Parol evidence is admissible to show that the instrument was not delivered or intended to be effective, that a signature is a forgery or unauthorized, or that the transaction was procured by misrepresentation, duress, or as a result of mistake.[10] These formal matters of creation which may be raised as between the parties to the transaction are fully applicable to mortgages. An educational decision illuminating several aspects of these problems, *Moehlenkamp v. Shatz*,[11] dealt with the procedural framework in which a co-mortgagor contended that her signature on a note and mortgage was unauthorized or a forgery. The issue of non-execution was properly raised under the Indiana trial rules by a sworn plea of non est factum, which then placed the burden of going forward with evidence of lack of authority on the mortgagor.[12] However, in this case the court found that the defending mortgagor impliedly had authorized her husband to sign the note and mortgage on entireties property in light of his long practice to conduct her business with her tacit approval.[13] The authenticity of her signature also was supported by the fact that the mortgage referring to the note was acknowledged. Although consideration is not required to support a mortgage[14] or establish the validity of a negotiable note given for

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[9]IND. CODE § 34-2-28-0.5 (Supp. 1980), *discussed in* text accompanying notes 142-52 *infra*.

[10]*E.g.*, Reinskopf v. Rogge, 37 Ind. 207 (1871) (execution ineffective where mortgagor drunk).

[11]396 N.E.2d 433 (Ind. Ct. App. 1979).

[12]IND. R. TR. P. 9.2(B). In this case the plea of *non est factum* was not filed in the responsive pleading as required by the rule. *Id.* 9(B). The plaintiff was barred from asserting the defendant's delay in filing the plea because of his failure to raise the issue at the trial.

[13]396 N.E.2d at 437.

[14]Goethe v. Gmelin, 256 Mich. 112, 239 N.W. 347 (1931) (mortgage effective as gift although note secured by it was ineffective).

the prior indebtedness of any person,[15] the court found that the note and mortgage were supported by consideration insofar as they were given to replace a prior debt of the husband upon which the wife was not liable.[16]

Formation of a conditional sales contract, which has many attributes of a mortgage in Indiana, is sometimes governed by the rules of offer and acceptance or a meeting of the minds. Accordingly, *Wallace v. Rogier*[17] recognized that parol evidence is admissible to show that a fully signed conditional sales contract is a sham and ineffective where it was prepared to enable the purchaser to obtain a loan.[18] Other recent decisions recognized that a conditional sales contract may be rescinded when it has been procured by false material misrepresentations of fact[19] and reformed when an error in the description resulted from mutual mistake.[20] The court in *Bixwood, Inc. v. Becker*[21] recognized that an option to sell land created an interest in land, and held that upon failure of performance by the purchaser the vendor was entitled to bring an action to quiet title and cancel the recorded contract.[22]

2. Real Estate—Priorities.—A lien or interest in land may be perfected as against subsequent purchasers by recordation,[23] by reservation in the instrument of transfer through which title is claimed,[24] or by possession.[25] In a dubious opinion, the court of ap-

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[15]IND. CODE § 26-1-3-408 (1976).

[16]396 N.E.2d at 438-39.

[17]395 N.E.2d 297 (Ind. Ct. App. 1979).

[18]Invalidity was proved by the testimony of the lawyer who prepared the conditional sales contract for the parties. The vendors were allowed to eject the purchasers in possession as tenants at sufference.

[19]Shuee v. Gedert, 395 N.E.2d 804 (Ind. Ct. App. 1979). The purchasers prevailed on their counterclaim for rescission and restitution in the vendor's action for specific performance. Evidence established that the vendors of a mobile home park had misrepresented that utilities were properly installed, taxes were approximately $2500 less than they were in fact, and income was more than that generated by the business.

[20]Liestikow v. Hoosier State Bank, 394 N.E.2d 225 (Ind. Ct. App. 1979).

[21]391 N.E.2d 646 (Ind. Ct. App. 1979). The case reinforces the turnaround of Indiana law which at one time held that an option to purchase land created no interest in the land until the option was exercised. *Compare* Raco Corp. v. Acme-Goodrich, Inc., 235 Ind. 67, 131 N.E.2d 144 (1956) (The modern view finds that such an option creates a covenant.) *with* Koehring v. Boman, 194 Ind. 433, 142 N.E. 117 (1924) (The former view found that "a mere option to purchase land could not vest in the holders any title at all, whether by entireties or otherwise, so long as the option had not been exercised.").

[22]391 N.E.2d at 648-49.

[23]194 Ind. at 437, 142 N.E. at 118. *E.g.*, IND. CODE §§ 32-1-2-16 to -18 (1976).

[24]*E.g.*, Warford v. Hawkins, 150 Ind. 489, 50 N.E. 468 (1898).

[25]*E.g.*, McClellan v. Beatty, 115 Ind. App. 173, 53 N.E.2d 1013, 55 N.E.2d 327 (1944). *See also* Mishawaka St. Joseph Loan & Trust Co. v. Neu, 209 Ind. 433, 196 N.E. 85, (1935) (applying the questionable "lazy banker" rule holding that the banker was not charged with notice of two days possession).

peals may have added another method of perfection to this list. In *Berrey v. Jean*,[26] the title of the adverse possessor which was not perfected on the records or, arguably, by possession prevailed against a later bona fide purchaser from the record owner whose title had been cut off by the adverse possessor.[27] In *Fenley Farms, Inc. v. Clark*,[28] the court held that a purchaser was charged with knowledge of the possessory status of the land, including the claim of the public to a visible roadbed. Another decision[29] discussed elsewhere recognized the rule that when record title is taken by husband and wife they become owners as tenants by the entireties, and one cannot transfer his interest without the other. However, the case held that if the record shows a conveyance or transfer by one of the spouses, further inquiry by a purchaser may be required to ascertain if the transfer is authorized before the purchaser will be a bona fide purchaser.[30]

3. Conditional Sales Contracts of Real Estate—Contracts and Options.—Under the doctrine of *Skendzel v. Marshall*,[31] it has been settled Indiana law that the rights of a purchaser under a conditional sales contract are those of an equitable owner and essentially those of a mortgagor where a substantial part of the price (more than a minimal amount) has been paid. Consequently, upon default by the purchaser, the vendee must proceed by judicial foreclosure as in the case of mortgages. Strict foreclosure, as provided by the contract, thus is not permitted, at least in the absence of abandonment or circumstances establishing that the security is seriously impaired due to waste or non-payment of taxes. This rule was reaffirm-

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[26]401 N.E.2d 102 (Ind. Ct. App. 1980). In this case the land was acquired by adverse possession for use as a cemetery. Perfection by possession could have been found from the fact that some gravestones were on a part of the property which was marked by a fence on three sides. Hence, a purchaser may have been put on notice from these facts.

[27]Some older decisions held that an adverse title need not be recorded or perfected since the prior owner had nothing to convey. *E.g.*, Schall v. Williams Valley R.R., 35 Pa. 191 (1860). However, since the adverse possessor may perfect his title by possession, suit and lis pendens notice, or by affidavits which may be filed establishing his title of record as against prior record owners, *see* IND. CODE §§ 17-3-47-1 to -3 (1976), he should not be allowed to set up his title against a later bona fide purchaser from the prior owner unless he does so.

[28]404 N.E.2d 1164 (Ind. Ct. App. 1980). The roadway was claimed on the grounds of public use for 20 years under IND. CODE § 8-20-1-15 (1976).

[29]Beneficial Fin. Co. v. Wegmiller Bender Lumber Co., 402 N.E.2d 41 (Ind. Ct. App.), *rehearing denied*, 403 N.E.2d 1150 (Ind. Ct. App. 1980). This case is discussed in the text accompanying notes 104-07 *infra*.

[30]*See* 402 N.E.2d at 45.

[31]261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974), *on mandate to enforce order*, 263 Ind. 337, 330 N.E.2d 747 (1975).

ed and applied by the court of appeals in *McLendon v. Safe Realty Corp.*[32] in which the purchaser who was current on installments, but delinquent on payment of taxes, had assigned his rights to another purchaser. The court determined that although the property was vacant, it was not abandoned by the purchaser who did not abscond.[33] The court indicated that whether or not a vendee has paid a substantial amount upon the contract must be determined by his equity in the property, which in turn is dependent upon the amount owing in relation to the value of the property at the time of foreclosure.[34] Because there was no proof of value, the court determined that payments of $7,276 on a principal amount of $10,000, enhanced by unpaid taxes which brought the latter to $17,935, established a payment of forty per cent of the contract price and therefore more than a minimal amount. In another decision[35] the court upheld a pretrial order of the lower court treating an action by the vendor under a conditional sales contract for forfeiture as an action to foreclose the lien in accordance with the rule of *Skendzel v. Marshall.*[36] *Boswell v. Lyon*[37] demonstrates that the position of the vendor under the *Skendzel* doctrine may be enhanced by allowing him to recover a deficiency judgment against the purchaser when the property is insufficient to satisfy the obligation. On the other hand, *Hawkins v. Marion County Board of Review*[38] repudiates the underpinnings of *Skendzel* by holding that a conditional purchaser of real estate is neither indebted on a "mortgage" nor is he one who "owns real property" within the meaning of a statute[39] allowing a $1,000 mortgage exemption.[40] By denying the tax exemption and finding no denial of equal protection to conditional buyers of real estate, the court of appeals ignored common knowledge that the conditional sale is a poor man's security device. The effect of the court's opinion is in fact a pervasive discrimination against the very poor.[41]

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[32]401 N.E.2d 80 (Ind. Ct. App. 1980).

[33]*Id.* at 83.

[34]*Id.*

[35]Leistikow v. Hoosier State Bank, 394 N.E.2d 225 (Ind. Ct. App. 1979) (action for strict foreclosure filed prior to *Skendzel* but decided after *Skendzel*).

[36]26 Ind. 226, 301 N.E.2d 641 (1973).

[37]401 N.E.2d 735 (Ind. Ct. App. 1980).

[38]394 N.E.2d 957 (Ind. Ct. App. 1979) (at the time the exemption was claimed the purchaser had paid $5,325 on a price of $6,750).

[39]*Id.* at 959.

[40]IND. CODE § 6-1.1-12-1 (Supp. 1980).

[41]394 N.E.2d at 959-60. The homestead credit allowed to owners of residential property for 1980 and thereafter may be claimed by contract purchasers. IND. CODE § 6-1.1-20.9-2 (Supp. 1980). In 1975 the statute allowing the $1000 exemption was amended to include contract purchasers who have agreed to pay the taxes. Act of April 24,

4. Effect of Transfers by Parties to a Security Transaction.—A transfer of the collateral by a mortgagor, conditional purchaser, or lien debtor may have an important impact on the obligations of the parties. In Indiana if the property is sold "subject" to the lien or without a provision for the assumption of the indebtedness secured, the property becomes primarily liable for the obligation secured and the transferor remains liable as a surety.[42] If the transferee assumes the obligation, he, along with the property, is primarily charged and the seller becomes a surety.[43] In no case is the transferor relieved of his liability upon the obligation unless the lien creditor accepts the new owner in lieu of the original debtor under an articulated agreement amounting to a novation—an arrangement that is rare.[44] This problem was reviewed by Judge Buchanan in a classic casebook type opinion, *Boswell v. Lyon*,[45] which should be studied by students of the law. There V sold land to P1 on a conditional sales contract providing that transfers by the purchaser would be allowed only with the written consent of the vendor. Later P1 assigned his interest to P2 who assumed the contract, and V in writing "hereby consent[ed]" to the assignment. Still later, P2 similarly assigned to P3, and V similarly assented in writing to this transfer. When P3 failed to make payments, V foreclosed on the property naming P1, P2 and P3 as parties. After judgment was entered against P1, P2 and P3 on the debt, a sale of the property was ordered. On appeal, P1 claimed that when V consented to the transfers, P1 was released from the

1975, Pub. L. No. 39, § 1, 1975 Ind. Acts 182 (curently codified at IND. CODE § 6-1.1-12-1 (Supp. 1980)).

[42]Mutual Benefit Life Ins. Co. v. Lindley, 97 Ind. App. 575, 183 N.E. 127 (1932). Compare Company Gross Income Tax Div. v. Crown Dev. Co., 231 Ind. 449, 109 N.E.2d 426 (1952) (A purchaser of real estate who assumes a mortgage indebtedness becomes the principal debtor and the grantor acts as a surety.) *with* Rauch v. Circle Theatre, 374 N.E.2d 546 (Ind. Ct. App. 1978) (lessee's assignment of a lease did not discharge its duty under the lease to the lessor).

[43]The rule was recognized by two recent decisions: Shuee v. Gedert, 395 N.E.2d 804 (Ind. Ct. App. 1979) (where the court recognized in a footnote that the land was primarily liable for the debt, *id.* at 806 n.4); Foremost Life Ins. Co. v. Department of Ins., 395 N.E.2d 418 (Ind. Ct. App. 1979) (paying surety entitled to subrogation). The transferee assuming a lien or debt may be held on his promise by the lienholder as a third party creditor beneficiary. Helms v. Kearns, 40 Ind. 124 (1872). If the deed or conveyance shows that a grantee assumes a lien or debt, parol evidence usually will not be admitted to show another prior or contemporaneous arrangement. *See generally* Annot., 94 A.L.R. 1319 (1935). Parol evidence is admissible to show that a grantee did not assent to the provision. Metzger v. Huntington, 139 Ind. 501, 37 N.E. 1084, *rehearing denied* 39 N.E. 235 (1894). Parol evidence is admitted even if the conveyance is made with warranty. Whicker v. Hushaw, 159 Ind. 1, 64 N.E. 460 (1902).

[44]Navin v. New Colonial Hotel, 228 Ind. 128, 90 N.E.2d 128 (1950) (vendor could not be required to accept purchaser's assignee in lieu of purchaser where vendor did not agree).

[45]401 N.E.2d 735 (Ind. Ct. App. 1980).

obligation. The court properly held that absent an agreement by the vendor meeting the requirements of a novation, P1 remained liable as a surety on the obligation.[46] Further, the vendor's consent to the second assignment without P1's approval did not affect the obligation of P1 or release P1 from his suretyship obligation to pay.[47]

The court in *Brendonwood Common v. Franklin*[48] held that the restrictive covenants imposing a duty to pay assessments for the upkeep of roads and making the obligation a lien upon the various lots in the Brendonwood subdivision ran with the land and bound successive lot owners.[49] A provision for attorneys' fees also ran with the land and was secured by the lien.[50] Other recent cases determined that a mortgagee in the mortgage banking business who assigns mortgages to banks, then collects the mortgage payments as an agent for the banks, and turns over the payments to an escrow account is not liable for intangible taxes,[51] or for gross income taxes on interest received and then transmitted to the assignee banks.[52]

5. Remedies of a Secured Party Under the Uniform Commercial Code—Repossession by Self Help; Event of Default.—Upon an event of default, a secured party, under the express provisions of the Uniform Commercial Code, may repossess the collateral and toward this end may exercise self help if this can be done without breach of peace unless there is an agreement to the contrary.[53] The court applied this provision in *Census Federal Credit Union v. Wann*[54] and held that the secured party committed no breach of the peace by repossessing a motor vehicle at 12:30 a.m. from the parking lot of the debtor's apartment building without contacting the debtor or others.[55] A prior demand for a return of the collateral had been made and refused. While the court indicated that the secured party may not break into homes, other buildings or enclosed spaces or commit a crime to repossess, no wrong is committed by taking

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[46]*Id.* at 743-45.

[47]The first purchaser argued that he was released as surety when the vendor consented to the second assignment on the theory that the obligation was altered. This contention was rejected on the obvious ground that the vendee's risk was diminished by a new obligor who assumed the obligation.

[48]403 N.E.2d 1136 (Ind. Ct. App. 1980).

[49]*Id.* at 1141.

[50]*Id.* at 1143. The case without citation thereto seems to overrule Levin v. Munk, 97 Ind. App. 118, 169 N.E. 82 (1929), which held that a covenant in a *lease* to pay attorney's fees does not run with the land.

[51]Meridian Mortgage Co. v. State, 395 N.E.2d 433 (Ind. Ct. App. 1979).

[52]Indiana Dep't of Revenue v. Waterfiled [sic] Mortgage Co., 400 N.E.2d 212 (Ind. Ct. App. 1980).

[53]IND. CODE § 26-1-9-503 (1976).

[54]403 N.E.2d 348 (Ind. Ct. App. 1980).

[55]*Id.* at 351.

the property off a street, parking lot or unenclosed space without contest from the debtor or another person.[56] In other words, a sneaky repossession made without breaking into an enclosure is not a breach of the peace, particularly if it is preceded by demand for return of the collateral.[57]

On the other hand, a secured party who repossesses collateral in breach of the peace or before an event of default is a converter; if his actions are made knowingly or maliciously, he may be held for punitive damages as well.[58] This principle was applied in *Van Bibber v. Norris*[59] in which the secured party and its assignee had repossessed a mobile home before installments were overdue, and the secured party had disposed of the contents of the home which apparently were not covered by the security agreement.[60] The court upheld substantial punitive damages in different amounts against each party.[61]

The time at which a default occurs thus becomes important for determining when the secured party may repossess and proceed with this remedy. This time is fixed by the terms of the security agreement.[62] Most agreements allow the secured party at his option to accelerate the indebtedness and assert default if and when the debtor fails to pay an installment on time. However, if the secured party accepts late installments, a long line of Indiana security decisions hold that he cannot accelerate the indebtedness and claim an event of default until he notifies the debtor of his intent to do so

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[56]*Id.*

[57]For an excellent review of authories on self help, see Knauer, *Acceleration and Default*, RIGHTS AND REMEDIES OF AN INDIANA CREDITOR VI-16 to VI-22 (1980).

[58]The converting secure party may mitigate damages by deducting the unpaid indebtedness. *See* Townsend, *Secured Transactions and Creditors' Rights, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 310, 319 n.50 (1976).

[59]404 N.E.2d 1365 (Ind. Ct. App. 1980) (an excellent opinion of over twenty pages by Judge Young).

[60]In this case the secured party, who was the seller of the mobile home, had assigned the contract to a bank under an agreement to repurchase. The seller repossessed at the request of the bank before any installment was overdue, and ultimately the debtor sued both parties for conversion of the home and its contents. *Id.* at 1369-71.

[61]The court below, without a jury, awarded damages of $5,000 for the home, $10,000 for the contents against both parties, and punitive damages of $30,000 against the seller and of $10,000 against the assignee. *Id.* at 1369.

[62]Article 9 of the Uniform Commercial Code does not fix the time of default, so that the event of default must be fixed by the security agreement. The Uniform Consumer Credit Code for purposes of delinquency charges, allows the debtor a ten day grace period before an overdue installment under a precomputed consumer credit sale or loan is in default. IND. CODE §§ 24-4.5-2-203, -3-203 (1976). However, those sections do not add a ten day grace period to the time of payment for purposes of default under Article 9 of the Code.

and gives the latter a reasonable time in which to bring the obligation current.[63] This rule was applied in *Van Bibber v. Norris*[64] where the repossessing secured party had accepted fifty-seven past due payments, thirty-seven of which were delinquencies, as determined by the bank's internal policies.[65]

Many security agreements contain provisions attempting to avoid the foregoing rule of waiver.[66] *Van Bibber* held that an anti-waiver provision in a security agreement was invalid for the basic reason that the secured party's acceptance of late payment spoke louder than the words in the contract.[67] The court recognized that anti-waiver provisions are unconscionable and implied that a secured party who invokes the clause is guilty of bad faith.

Another common acceleration provision used in security agreements is the so-called insecurity clause which allows acceleration when the secured party deems himself insecure. The Uniform Commercial Code invalidates the secured party's exercise of rights under these clauses unless done in good faith, but the Code puts the burden of proving bad faith upon the debtor.[68] Case law has eased this unreasonable burden by allowing the debtor to prove facts or lack of facts known to the creditor from which a reasonable person acting in good faith could find indebtedness or payment insecure.[69] In *Van Bibber* the secured party claimed the right to repossess a mobile home under this kind of insecurity clause when it learned that the debtor was in jail on a drug charge. On appeal the court of appeals held that the lower court could reasonably find that an acceleration was in bad faith when it was based upon the secured

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[63]Cases applying or recognizing this rule of waiver have been considered in the following survey articles of the INDIANA LAW REVIEW: Townsend, *Secured Transactions and Creditors' Rights, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 252, 261 (1978) [hereinafter cited as Townsend, *1977 Survey*]; Townsend, *Secured Transactions and Creditors' Rights, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 310, 315 (1976) [hereinafter cited as Townsend, *1976 Survey*]; Townsend, *Secured Transactions and Creditors' Rights, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 226, 231 (1973) [hereinafter cited as Townsend, *1973 Survey*].

[64]404 N.E.2d at 1373.

[65]In this case the installment claimed as a basis for acceleration and default was due on October 30. The assignee bank directed the seller-assignor to repossess on November 9 (within the 10 day grace period granted by the bank). The seller repossessed on November 20 without a demand for payment from the debtor. *Id.* at 1371.

[66]*E.g.*, Pierce v. Yochum, 330 N.E.2d 102 (Ind. Ct. App. 1975) (construing anti-waiver clause as applicable to future, but not past payments); Nelson v. Butcher, 352 N.E.2d 106 (Ind. Ct. App. 1976) (anti-waiver clause ignored by court).

[67]404 N.E.2d at 1374.

[68]IND. CODE § 26-1-1-203 (1976).

[69]Universal C.I.T. Credit Corp. v. Sheplar, 164 Ind. App. 516, 329 N.E.2d 620 (1975), *discussed in* Townsend, *1976 Survey, supra* note 63 at 310.

party's bare knowledge of the criminal charge without further inquiry as to guilt or the effect of the criminal charge upon payment of the obligation;[70] the creditor knew that seventy per cent of the purchase price had been paid; and the value of the collateral exceeded the indebtedness which was secured by the suretyship obligation of the assignor of the contract.[71] The secured party was not allowed to buttress his case by proof of facts of which he had no knowledge at the time of his decision to accelerate. *Van Bibber* stands for the proposition that a secured party taking advantage of an insecurity clause because the debtor is in jail runs the risk of an expensive lawsuit when he repossesses the collateral, unless his decision is also based on other facts making it reasonable to suppose that he will not be paid or his security is impaired.

Lenders should take note of one other point made by *Van Bibber*. The court indicated that in any case of acceleration, the secured party is bound by the general requirement of good faith which cuts across all transactions under the Code.[72] One ground for acceleration and default under the security agreement in that case was the creation of an "encumbrance" by the debtor. It was proved that a third party had obtained a restraining order preventing the debtor from removing the collateral from a mobile home park—apparently to protect the park's right to an artisan's lien for back rent. Although the court determined that the record did not establish the restraining order to be an encumbrance, the court nonetheless held that the injunction could not be claimed as a basis for a default unless the secured party relied upon the encumbrance.[73] Absent reliance, the secured party did not meet the requirement of good faith as imposed by section 1-203 of the Uniform Commercial Code.[74]

6. Mortgage Foreclosure.—A foreclosure action by a mortgagee or lienholder is an equitable proceeding. If suit is brought upon the note or indebtedness in the same action, the whole case is drawn into equity under the court's clean up power and decided without a jury.[75] If the debtor counterclaims for damages on a legal

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[70]404 N.E.2d at 1377.

[71]The court recognized that an installment was overdue for less than 10 days at the time of acceleration. However, as noted above, this ground for default had been waived. *See also* Holmes v. Rushville Prod. Credit Ass'n, 170 Ind. App. 509, 353 N.E.2d 509 (1976), *amended on other grounds on rehearing*, 170 Ind. App. at 518-19, 357 N.E.2d at 734, *transfer denied*, 267 Ind. 454, 371 N.E.2d 379 (1978) (where acceleration was upheld although the obligation was secured by a surety but other facts indicated that security was impaired).

[72]404 N.E.2d at 1373. "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." IND. CODE § 26-1-1-203 (1976).

[73]404 N.E.2d at 1374-75.

[74]*Id.* at 1372-73.

[75]Carmichael v. Adams, 91 Ind. 526 (1883). It has been held that if a third party is

cause of action, that claim too will be decided by the equity court without a jury.[76] These principles were recognized in *Farmers Bank & Trust Co. v. Ross*[77] in which the mortgagor in a mortgage foreclosure action filed a counterclaim for breach of a contract to loan money. The court submitted all the issues to an advisory jury and entered judgment on the decision of the jury. The appellate court held that all the issues were triable in equity, and while an advisory jury was proper, a judgment for the mortgagee on the debtor's counterclaim was reversed because it appeared from the record that the trial judge felt that he was bound to follow the jury verdict.[78]

Once foreclosure proceedings have commenced under a properly recorded mortgage or lien, persons acquiring an interest in the property from the mortgagor pending the suit (lis pendens) need not be made parties and are bound by the judgment or decree.[79] One recent decision recognized the rule,[80] and another held that the court must allow the transferee to intervene in the proceedings.[81]

Warner v. Webber Apartments, Inc.[82] held that a mortgagee may forego his right to foreclose on the mortgage and may instead recover upon the written promise contained in the mortgage instrument to pay the secured indebtedness.[83] Although foreclosure was not sought,[84] the case also allowed recovery of attorneys' fees which were provided for within the promise to pay the indebtedness.

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a surety on the mortgage note, the surety, claiming a defense that he was not bound on the note by a plea of *non est factum*, is entitled to a jury trial upon proper request. Hartlep v. Murphy, 197 Ind. 222, 150 N.E. 312 (1926).

[76]Henning v. Rieth-Riley Constr. Co., 141 Ind. App. 99, 226 N.E.2d 350 (1967) (foreclosure of mechanic's lien).

[77]401 N.E.2d 74 (Ind. Ct. App. 1980).

[78]*Id.* at 76.

[79]Zilky v. Carter, 226 Ind. 396, 81 N.E.2d 597 (1948). However, foreclosure or litigation involving an unperfected lien or interest in real estate does not constitute lis pendens notice as against bona fide purchasers unless lis pendens notice is filed as provided by statute. IND. CODE §§ 34-1-4-1, -2 to -3, -8 (1976).

[80]Braun v. Loshe, 390 N.E.2d 189 (Ind. Ct. App. 1979) (assignee of vendee bound by judgment against vendee seeking specific performance).

[81]Maisel and Assocs. v. Canden Corp., 398 N.E.2d 1366 (Ind. Ct. App. 1980) (purchaser from mortgagee allowed to intervene in action to set aside sale under foreclosure action).

[82]400 N.E.2d 1180 (Ind. Ct. App. 1980).

[83]*Id.* at 1181. Foreclosure of the lien without a prayer for a deficiency or recovery upon the debt will bar a later suit for a deficiency. Mutual Benefit Life Ins. Co. v. Bachtenkircher, 209 Ind. 106, 198 N.E. 81 (1935). Older cases allowing the mortgagee to recover judgment upon the debt and later foreclose upon the mortgage securing the debt when the judgment is not paid are questionable. *Compare* Kozanjieff v. Petroff, 215 Ind. 286, 19 N.E.2d 563 (1939) *with* Muncie Nat'l Bank v. Brown, 112 Ind. 474, 14 N.E. 358 (1887).

[84]400 N.E.2d at 1182.

B. Creditors' Rights

1. Mechanics' Liens—In General.—The Indiana mechanics' lien statute[85] protects a class of persons described as subcontractors, materialmen and laborers and equipment lessors of the prime contractor and his subcontractors.[86] An established common law rule, that the statute does not extend to materialmen furnishing materials and goods to other materialmen, was recently recognized and applied in *City of Evansville v. Verplank Concrete & Supply, Inc.*[87] In that case, Verplank furnished the beams and cement to a materialman who had agreed to supply the beams to the contractor; the materialman did not agree to perform any work at the site.[88] While a mechanic's lien generally cannot be procured against governmental property,[89] *Verplank* held that the mechanics' lien statute protected materialmen performing under the contract of a trustee financing a parking garage on lands leased by a municipality with pledged income bonds.[90] The court explained the exception on the basis that the statute authorizing the project did not require a surety protecting suppliers of work and materials as in the case of "public" contracts.[91]

A materialman must prove that materials furnished to a project were used in the construction. One qualification to this rule is that a presumption of use arises from proof that the materials were delivered at the construction site. This qualification was recently applied in *Templeton v. Sam Klain & Sons, Inc.*[92]

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[85]IND. CODE § 32-8-3-1 (Supp. 1980).

[86]*Compare* Wood v. Isgrigg Lumber Co., 71 Ind. App. 64, 123 N.E. 702 (1919) *with* Nash Eng'r Co. v. Marcy Realty Corp., 222 Ind. 396, 54 N.E.2d 263 (1944) *and* Stephens v. Duffy, 41 Ind. App. 385, 83 N.E. 268 (1908), *aff'g*, 41 Ind. App. 385, 81 N.E. 1154 (1907) (applying an earlier version of IND. CODE § 32-8-3-1 (1980)).

[87]400 N.E.2d 812 (Ind. Ct. App. 1980).

[88]*Id.* at 820. If a security interest is retained by the seller furnishing goods to a materialman, it seems that the lien could not be asserted against the owner who is a buyer in the ordinary course of business. *See* IND. CODE § 26-1-9-307(1) (1976); *cf.* Puritan Eng. Corp. v. Robinson, 207 Ind. 58, 191 N.E. 141 (1934) (a materialman claiming a lien must show that his materials were furnished for the specific purpose of use in the building on which he claims a lien).

[89]Repp & Mundt, Inc. v. Hitzelberger Supply Co., 353 N.E.2d 547 (Ind. Ct. App. 1976).

[90]400 N.E.2d at 818.

[91]The project was authorized by a statute providing for the financing of city economic and pollution development facilities. IND. CODE § 18-6-4.5-1 (1976 & Supp. 1980). This was determined not to be "public" construction for which surety bonds are required to protect suppliers, because the construction was not paid for with "funds derived from taxation or from special assessments." *Id.* § 5-16-5-2.

[92]400 N.E.2d 1198 (Ind. Ct. App. 1980). Another exception to the rule estops the owner to deny that materials were used in the construction when ordered by him. Van Wells v. Stanray Corp., 341 N.E.2d 198 (Ind. Ct. App. 1976).

In enforcing a mechanic's lien, the mechanic is entitled to attorneys' fees, but not if the owner has paid in full.[93] This principle was recognized in *Templeton* in which the court found that payment had not been made in full but held that attorneys' fees incurred in successfully defending the lien on appeal could not be recovered.[94]

2. Notice by Subs to Owners.—The statutory provision requiring subs claiming liens against "owner-occupied" real estate to give written notice to the owner within thirty days of commencement of the performance (sixty days in the case of new construction)[95] was held applicable to a conditional buyer temporarily driven from his home when it was partially destroyed by fire and when the materialman furnishing supplies for the repair failed to give the required notice to the absent buyer.[96] In another decision, *Mid-America Homes v. Horn*,[97] the Indiana Supreme Court sensibly defined the term "owner" entitled to notice under this provision to mean the owner contracting with the prime contractor—not a record owner who is not a party to the construction under which the lien is claimed.[98] In doing so, the court reversed the court of appeals which had held that notice to the vendor who had contracted to sell the land to a purchaser was sufficient because he was the record owner and that notice to the vendee who had contracted with the prime contractor was not required.[99] The supreme court properly pointed out that the purpose of this notice requirement is to alert the original contracting party that subs under the prime contractor plan to claim a lien if they are not paid. This permits the contracting party to take steps to assure proper application of his payments under the contract. Notice to a record owner who is not a contracting party will not achieve that purpose. The case also reinforces an old principle in mechanic's lien law to the effect that subs who have no contractual relation or rights with the owner must link their claims by connecting intervening contracts to the owner. Hence, notice

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[93]IND. CODE § 32-8-3-14 (1976).

[94]400 N.E.2d at 1202-04.

[95]IND. CODE § 32-8-3-1 (Supp. 1980).

[96]Barker v. Brownsburg Lumber Co., 399 N.E.2d 426 (Ind. Ct. App. 1980). This case involved the old statute requiring notice within five days (fourteen if new construction) of commencement. The time limits have been extended by a 1977 amendment. Act of Apr. 12, Pub. L. No. 310, § 1, 1977 Ind. Acts 1424 (currently codified at IND. CODE § 32-8-3-1 (Supp. 1980)).

[97]396 N.E.2d 879 (Ind. 1979).

[98]*Id.* at 883.

[99]377 N.E.2d 657, 659-60 (Ind. Ct. App. 1978), *criticized in*, Townsend, *Secured Transactions and Creditor's Rights, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 289, 305-06 (1979).

must go to the owner in this chain of privity of which subs must be aware.

Henderlong Lumber Co. v. Zinn[100] also dealt with the same notice provision. A late notice was given to the owner by a sub who claimed that the lien nonetheless should be effective with respect to performances rendered after the notice was received. The court rejected this argument on the obvious ground that the statute, as a condition precedent to the lien, required the notice to be given within the specified time after the "first delivery of labor performed."[101] The sub who furnished materials also sought to uphold the notice as partially effective by claiming that deliveries were made under separate contracts, thus qualifying those deliveries timely made under separate contracts. The evidence did not support this contention and the court in effect found that all deliveries were made under one contract.[102]

3. Recording Notice of Mechanic's Lien.—Notice of the mechanic's lien against real estate describing the property and naming the owner must be filed in duplicate with the recorder within sixty days of the last performance by the mechanic.[103] This statute seems designed to accomplish at least three separate objectives. One is to fix a time period during which a lien may be claimed. Another is to provide the means for getting to the owner belated notice of the lien which is claimed. This second objective is accomplished by a provision that the county recorder mail a required duplicate copy to the named owner. Still a further purpose is to provide a form of record notice of the lien to purchasers from the

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[100]406 N.E.2d 310 (Ind. Ct. App. 1980). This case dealt with the statute when it required the five day notice in the case of an old contract and the fourteen day notice in the case of a new contract. IND. CODE § 32-8-3-1 (1976) (current version at IND. CODE § 32-8-3-1 (Supp. 1980)).

[101]406 N.E.2d at 312 (based upon IND. CODE § 32-8-3-1 (1976) (current version at IND. CODE § 32-8-3-1 (Supp. 1980)) (emphasis in original).

[102]406 N.E.2d at 313. In granting summary judgment for the owner, the court held that the supplier carried the burden of proving that performances were made under different contracts, a burden which was not supported by invoices showing deliveries upon different dates. *Id.* Case law supports the proposition that recording provisions of the mechanics' lien law must be separately satisfied with respect to work and materials furnished under separate contracts. Saint Joseph's College v. Morrison, Inc., 158 Ind. App. 272, 302 N.E.2d 865 (1973) (holding that one recorded notice for separate contracts was sufficient if notice was recorded within the statutory time for each contract but that tacking to enlarge the time would not be permitted). On this basis, the argument in the *Zinn* case that a materialman under separate contracts must give notice to the owner under time limits with respect to each separate contract is logical, if not practical.

[103]IND. CODE § 32-8-3-3 (1976). This means that transferees must take notice of construction in progress and for 60 days after completion.

owner and to protect purchasers and creditors who deal with the owner when the notice is not properly and timely filed. An interesting problem arose in *Beneficial Finance Co. v. Wegmiller Bender Lumber Co.*,[104] where the prime contractor contracted with owners who owned the land as tenants by the entireties. The court held that a notice by an unpaid sub naming only the husband as owner was sufficient to meet the notice requirements of the statute.[105] The notice was certainly sufficient to notify the owners of the lien since the husband had contracted with the prime as agent for the wife.[106] In holding that the notice was sufficient to put purchasers and creditors upon notice of the lien, the third objective of the statute, the decision clarified an important problem in title and recordation law arising where one of two tenants by the entireties executes a deed, mortgage, or other instrument transferring entireties property without the other party being named.[107] The case, although involving a mechanic's lien notice, suggests that the conveyance by one spouse is sufficient to put purchasers and creditors on constructive notice that the transfer may have been authorized by the non-named entireties party. Title lawyers should carefully

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[104]402 N.E.2d 41 (Inc. Ct. App.), *rehearing denied*, 403 N.E.2d 1150 (Ind. Ct. App. 1980). On rehearing the case, the court held that the recorded notice of a lien need not describe or identify the type of ownership of the named owner.

[105]402 N.E.2d at 46. In resolving the problem, the court embarked upon an unnecessary, unclear line of reasoning whether or not the court should be prejudiced against the mechanics' lien statute by giving it a strict or liberal construction. This action raises the unsavory possibility that perhaps the decision was based upon the judge's hatred or love for this law.

[106]*Id.* Another recent decision recognizes that the husband may, as established by rules of implied or apparent authority, be authorized to bind the wife in conveyances of entireties property. Moehlenkamp v. Shatz, 396 N.E.2d 433 (Ind. Ct. App. 1979), *discussed in* text accompanying note 11.

[107]402 N.E.2d at 46. Normally a recorded transfer by an owner outside the record chain of title is not constructive notice of the rights of the transferee. Thus, if M, holding under an unrecorded contract with V, gives a mortgage to E which is recorded and five years later M acquires record title, a later bona fide purchaser from M is not put on constructive notice of the mortgage. Sinclair v. Guzenhauser, 179 Ind. 78, 98 N.E. 37 (1912), *aff'd on rehearing*, 179 Ind. 67, 100 N.E. 376 (1913); Bingham v. Kirkland, 34 N.J. Eq. 229 (1881). *See also*, Tefft v. Munson, 57 N.Y. 97 (1874). The question thus arises, where a deed is made to H and W as tenants by entireties, whether a transfer by one of the spouses alone is outside the chain of title since neither may convey without the other until the relation is terminated. Because the relation may be terminated by parol circumstances, such as death, divorce, or agreement, it seems that purchasers must take note of recorded transfers by one of the parties. *Compare* Simmons v. Parker, 61 Ind. App. 403, 112 N.E. 31 (1916) (mortgage by husband alone is constructive notice of purchase-money vendor's lien and put purchaser on duty of inquiry) *with* Brower v. Witmeyer, 121 Ind. 83, 22 N.E. 975 (1889) (purchaser of first recorded mortgage was required to determine whether holder took with notice of a purchase-money mortgage acquired prior in time but recorded subsequently).

take note of this. The general rule that both husband and wife must join in transfers of entireties property does not mean that a record conveyance by one party is facially ineffective. A transfer by one may be effective, and purchasers must make further inquiry into this possibility when a conveyance or transfer by one is of record or, as in this case, when notice of a mechanic's lien names only one of the spouses.

4. Priorities of Mechanics' Liens.—A properly recorded mechanic's lien on real estate relates back to the time the work first commenced,[108] and from that point the lien will take priority over subsequent or intervening mortgages and conveyances.[109] However, by the terms of the same statute the mechanic will share pro rata with prior and subsequent mechanic's liens.[110] This of course lays the groundwork for a possible circuity of lien problem when the lien of one mechanic takes priority over a later mortgage, and the lien of another mechanic commences after the same mortgage. In all probability, the mortgage will and should be defeated by both liens if they are properly recorded.[111] If the mortgage is promptly recorded, however, and if the loan made under the intervening mortgage is in fact applied to payment of mechanics with perfectable liens, the mortgagee should to that extent be subrogated to the equal priority status of those mechanics actually paid. The reasons for such action include avoiding unjust enrichment, avoiding an hideous circuity problem, and resolving fairly an important problem of construction financing when the owner needs new funds during progress of the work.[112] Unfortunately, this result, announced by two well entrenched Indiana cases,[113] was rejected by *Beneficial Finance Co. v. Wegmiller*

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[108]IND. CODE § 32-8-3-5 (1976).

[109]*Id. See, e.g.*, Northwestern Loan & Inv. Ass'n v. McPherson, 23 Ind. App. 250, 54 N.E. 130 (1899). A prior mortgage or lien as a general rule will take priority over subsequent mechanics' liens absent waiver or estoppel. *See, e.g.*, Robert Hixon Lumber Co. v. Rowe, 83 Ind. App. 508, 149 N.E. 92 (1925). However, subsequent mechanics with a lien upon buildings erected by them may remove the structures. IND. CODE § 32-8-3-2 (1976).

[110]IND. CODE § 32-8-3-5 (1976).

[111]For a circuity of lien problem between successive mortgages and an intervening mechanic's lien, see Thorpe Block Sav. & Loan Ass'n v. James, 13 Ind. App. 522, 41 N.E. 978 (1895), where there was no equality of priority problem.

[112]If a mortgagee advances funds to pay off prior mechanic's liens, equity will subrogate the mortgagee to those liens to prevent unjust enrichment. Mishawaka, St. Joseph Loan & Trust Co. v. Neu, 209 Ind. 433, 196 N.E. 85 (1935); Warford v. Hankins, 150 Ind. 489, 50 N.E. 468 (1898). Prior liens will be deferred to purchase money security interests to avoid unjust enrichment. *But see*, Houston v. Houston, 67 Ind. 276 (1879) (purchase money lien took priority over judgment lien).

[113]Ward v. Yarnelle, 173 Ind. 535, 91 N.E. 7 (1910); McLaughlin Mill Supply Co. v. Laundry Serv., 95 Ind. App. 693, 184 N.E. 429 (1933) (where only some of competing mechanic's lienholders had notice of mortgage).

Bender Lumber Co.,[114] in which the court deferred the recorded mortgage to a materialman although the mortgage loan was used to pay other mechanics.[115] Prior case law to the contrary was distinguished on the apparent ground that the mortgagee should share in priority only if the circumstances showed notice to or waiver by the competing mechanics.[116] This decision will not have a favorable impact on the financing of construction and should be overruled.

Purchasers generally must take notice of pending or recent construction because a mechanic's lien relates back to the time of commencement of the work; the lienholder has sixty days from the completion of work within which to record his mechanic's lien; and the mechanic's lien will take priority from time of commencement if notice of the lien is properly recorded.[117] The rule of relation back operates to the further advantage of the mechanic's lienholder against the owner or purchaser from the owner when the lienholder is called back and directed by the owner to correct defective work or complete the project. The mechanic then has sixty days after that completion in which to file notice of his lien.[118] The Indiana statute, however, contains a special provision protecting a purchaser of a single or double family dwelling for his own occupancy if he purchases innocently, without notice, and for value before notice of the lien is recorded.[119] This provision was applied in *Riggins v. Sadowsky*[120] in which an unpaid subcontractor had furnished work and materials for the owner's single family dwelling but had not recorded notice of his lien. The property was then sold to a purchaser who took possession; thereafter, the sub made some repairs at the purchaser's request. The sub then filed notice of his lien for his prior services within sixty days of the corrective work. The court, in reversing the decision below which had upheld the lien, held that the lienholder carried the burden of proving that he had filed notice of his lien prior to the purchase or that the purchaser was not a bona fide purchaser.[121] Established decisions allowing notice of the lien to be recorded within sixty days after corrective work demanded by the owner[122] were properly held inapplicable to

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[114]402 N.E.2d 41 (Ind. Ct. App.), *rehearing denied*, 403 N.E.2d 1150 (1980).

[115]402 N.E.2d at 48.

[116]*Id.*

[117]*Id.* at 46-47. *See* IND. CODE § 32-8-3-5 (1976).

[118]*See* note 103 *supra*.

[119]IND. CODE § 32-8-3-1 (1976 & Supp. 1980). The statute protects the good faith purchaser if he records his deed before the notice of lien is recorded.

[120]403 N.E.2d 1152 (Ind. Ct. App. 1980).

[121]*Id.* at 1155-56.

[122]*E.g.*, Potter v. Cline, 161 Ind. App. 349, 353, 316 N.E.2d 422, 425 (1974) (recogniz-

an innocent purchaser for value of a single or double dwelling for his own occupancy who was not aware of the unpaid bill owing to the prime mechanic when he requested the corrective work.[123] The burden of proving lack of good faith was correctly placed upon the lien-claimant because the purchaser apparently had paid a commercially reasonable value.[124] It is likely that the mechanic should have lost for another reason not discussed by the case. It did not appear from the facts that he had given the requisite written notice of intent to hold a lien within the thirty or sixty day period from the time of the corrective work to the purchaser who was an owner-occupant of a single or family dwelling. This requirement would seem reasonably applicable under these circumstances.[125]

5. Mechanic's Lien on Retainage.—A sub may assert a mechanic's lien upon funds owing by the owner to the prime by notifying the owner in writing of his claim without filing record notice of the lien.[126] A recent decision[127] held that the bringing of suit by the sub does not fulfill this notice requirement and indicated that if a lien upon the fund is to be obtained, it will not exist until the formal notice is given.[128] Another case, *Blade Corp. v. American*

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ing rule that completion of work under a separate contract did not extend time for filing notice of lien under another contract). Prior to the statutory provision protecting the bona fide purchaser, it was held that a purchaser who requested completion or corrective work under a construction contract of the vendor took subject to the relation back lien if the lien was recorded within 60 days after the completion of the corrective work. Conlee v. Clark, 14 Ind. App. 205, 42 N.E. 762 (1896). *See generally*, Townsend, *Secured Transactions and Creditors' Rights, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 305, 330-31 (1975).

[123]403 N.E.2d at 1155-56.

[124]*See* IND. R. TR. P. 9.1(D) which was not cited in the decision.

[125]*See* statute and discussion at note 95 *supra* and accompanying text. Because the purchaser is a new and different kind of owner-occupant, it seems that a mechanic should be required to give him written notice of his intent to claim a lien arising out of corrective work.

[126]IND. CODE § 32-8-3-9 (1976).

[127]Zeigler Bldg. Materials, Inc. v. Parkison, 398 N.E.2d 1330 (Ind. Ct. App. 1980) (materialman, by intervention in a suit by owner against the counterclaiming prime who had been discharged in bankruptcy, claimed a right to funds owing by owner to prime—court failed to recognize that the only right of a materialman-creditor of the bankrupt to do this would have been on the basis of a lien upon the fund owing by the owner to the prime).

[128]*Id.* at 1332. In this case a materialman claimed a right to funds owing by the owner to the prime contractor under whom the materials were furnished. The materialman intervened in a suit against the counterclaiming prime who had been discharged in bankruptcy. The court was unable to find a theory upon which the materialman could make a claim to the fund after the bankruptcy discharge of the prime contractor. It is submitted that this could have been sustained if the materialman had a valid, perfected lien upon the fund by virtue of the mechanic's lien statute. *See*, Avco Fin. Co. v. Erickson, 132 Ill. App. 2d 868, 270 N.E.2d 111 (1971).

Drywall, Inc.,[129] held that a proper notice of lien upon an obligation of the owner to the prime is ineffective if the owner's right of setoff against the prime contractor equals or exceeds the amount owing by the owner.[130] The owner's setoff consisted of payments and damages incurred as a result of the prime's default and abandonment of the work prior to the owner's receipt of notice.[131] Although the sub may claim a lien upon amounts owing to the contractor, an owner contracting with a prime for construction is not personally bound to a sub (subcontractors, laborers and materialmen contracting with the prime) supplying work or materials.[132] A provision in the contract between the owner and the prime that the prime will pay the subs does not contractually bind the owner to such parties, although, according to another recent case,[133] it will obligate the prime to subs who are not in privity with him as third party beneficiaries. Another current decision[134] recognized that a tenant may hold the landlord upon his promise to reimburse the tenant for improvements even though the tenant's notice of mechanic's lien was filed too late. The point is thus made that a mechanic with a promise of payment from the owner may have a remedy to enforce his lien and the promise as well, so that if one fails the other may prevail.

6. Application of Payment from Construction Fund.—A contractor often deals with a materialman or subcontractor who fur-

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However, the case properly seems to hold that unless notice is given the owner before bankruptcy, the lien may not be claimed after the petition is filed, apparently because it does not relate back to the commencement of performance. *Accord*, Lockridge v. Brockman, 137 F. Supp. 383 (N.D. Ind. 1956); 11 U.S.C. § 545(2) (1978) (unperfected statutory lien voidable if ineffective against bona fide purchaser); *Id.* § 547(c)(6). *But cf.*, *id.* § 546(b) (protecting lien which relates back).

[129]Blade Corp. v. American Drywall, Inc., 400 N.E.2d 1183 (Ind. Ct. App. 1980). Another decision found that the setoff was not proved. Templeton v. Sam Klain & Son, Inc., 400 N.E.2d 1198 (Ind. Ct. App. 1980).

[130]400 N.E.2d at 1186-87.

[131]It was determined that retainages by the owner were exceeded by expenses of completion incurred after the default and notice. The court indicated that as against lien notices against the fund, contractually provided retainages of the owner could be withheld until completion. *Id.* at 1186.

[132]Because privity is lacking between the owner or subs, the latter may not recover absent a binding direct or third party beneficiary promise of the owner. *E.g.*, Indianapolis Raceway Park, Inc. v. Curtiss, 386 N.E.2d 724, 727 (Ind. Ct. App. 1979), *discussed in* Townsend, *Secured Transactions and Creditors' Rights, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 369, 381-82 (1980) [hereinafter referred to as Townsend, *1979 Survey*].

[133]Zeigler Bldg. Materials, Inc. v. Parkison, 398 N.E.2d 1330 (Ind. Ct. App. 1980).

[134]Malbin & Bullock, Inc. v. Hilton, 401 N.E.2d 719 (Ind. Ct. App. 1980) (where landlord transferred funds realized from sale of leased property to escrow account for payment in case tenant won mechanic's lien suit, held that tenant recovering personal judgment against landlord could reach account by proceedings supplemental).

nishes supplies or work on several projects with different owners. Suppose that the owner on one project pays a contractor who uses the funds to make a partial payment to a materialman or subcontractor to whom the contractor is obligated on that project as well as on other projects. Must the money be applied to the project from whence the funds were generated? In *Templeton v. Sam Klain & Son, Inc.*,[135] the court of appeals recognized the basic rule that a debtor making a partial payment on two or more debts may direct application to one or the other; if he does not, the creditor may apply it as he sees fit; and if the creditor does not do so, the law will apply it to the least secured, or to the creditor's advantage, and in other cases to the oldest debt.[136] In this case, a materialman applied the funds deposited in a general account toward the oldest obligation owing by the contractor—another project. The court held that the creditor was under no obligation to apply the payments to the construction on the property of the owner who made payment since the materialman was unaware of the source of the funds.[137] The creditor was not bound by the deception of the contractor who indorsed check payments certifying payment of all materialmen and deposited them in his general account. The court indicated that the result might have been different had proof, which was lacking, established that the funds represented by the owner's restrictively indorsed check were in fact the ones used to make the payment, and that the creditor had knowledge of that fact.[138] Because mechanic's lienholders have the inchoate right to a lien upon those funds[139] and because criminal laws require disclosure of unpaid liens upon receipt of payment,[140] good faith should require the payee with knowledge of the source to apply the payment toward the contract generating the funds.[141]

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[135]400 N.E.2d 1198 (Ind. Ct. App. 1980).

[136]*E.g.*, McCauley v. Holtz, 62 Ind. 205, 207 (1878).

[137]400 N.E.2d at 1202. A similar result was reached in Western & Southern Indem. Co. v. Cramer, 104 Ind. App. 219, 10 N.E.2d 440 (1937), where a surety upon public construction contended that a materialman was required to apply payments from the surety's project towards obligations incurred on that project. *Contra*, Clow Corp. v. Ross Township School Corp., 384 N.E.2d 1077 (Ind. Ct. App. 1979), *discussed in* Townsend, *1979 Survey*, *supra* note 132, at 395.

[138]400 N.E.2d at 1202.

[139]Upon notice to the owner, a mechanic may obtain a lien upon retainages. IND. CODE § 32-8-3-9 (1976). *See generally* discussion at note 126 *supra* and accompanying text.

[140]IND. CODE § 32-8-3-15 (Supp. 1980).

[141]*See* Townsend, *1979 Survey*, *supra* note 132, at 396 n.196. Statutes in some states make payments received by a contractor, trust funds to be applied towards the construction obligations. *E.g.* Romero v. Romero, 535 F.2d 618 (10th Cir. 1976); *In re* Morris Ketchum, Jr. & Assocs., 409 F. Supp. 743 (S.D.N.Y. 1975). These cases denied

7. Exemptions.—The 1980 legislature modified the general exemption statute in four principal respects.[142] First, the total amount of exemption was increased to a new limit of $10,000; the increase is to include real estate or personal property constituting the debtor's personal or family residence to a value of $7,500; other real estate or tangible personal property to a value of $4,000; intangible personal property to $100 with an exclusion of debts and income owing; and unlimited amounts for professionally prescribed health aids.[143] Second, joint debtors' individual entireties interests in real estate or personal property constituting the debtor's personal or family residence may be claimed to a value of $7,500 (with the $10,000 total limit on this and other exempt property).[144] This changes prior decisional law disallowing joint debtors the right to claim entireties property exempt as against joint creditors.[145] Third, the option to claim the exemptions specified by the Bankruptcy Code was rejected, so that only Indiana exemptions may be claimed in bankruptcy.[146] A fourth provision[147] seems to make entireties real property exempt without limitation in bankruptcy proceedings, except in the case of joint or consolidated cases involving both spouses. To the extent that this final provision makes a special exemption rule for bankruptcy, it is clearly at war with the federal

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discharge to a bankrupt misapplying proceeds. *Contra*, *In re* Dloogoff, 600 F.2d 166 (8th Cir. 1979).

Payment received by a contractor under the Miller Act must be applied toward contract obligations. St. Paul Fire & Marine Ins. Co. v. United States, 309 F.2d 22 (8th Cir. 1962) (opinion by Judge Blackmun), *cert. denied*, 372 U.S. 936 (1963).

Indiana case law holds that the owners of equitable trust funds may reclaim them from an innocent creditor who applies them towards an antecedent debt. Peoples State Bank v. Caterpillar Tractor Co., 213 Ind. 235, 12 N.E.2d 123 (1938) (pre-existing debt is not value sufficient to constitute payee of money a bona fide purchaser). However, if a negotiable instrument is used to pay a prior debt, the payee may be a holder in due course, and if so, will take free of claims to the instrument. IND. CODE §§ 26-1-3-303(b), -305(1) (1976).

[142]Act of Mar. 3, 1980, Pub. L. No. 196, § 1, 1980 Ind. Acts 1625 (currently codified at IND. CODE § 34-2-28-0.5 (Supp. 1980) (effective April 1, 1980)).

[143]IND. CODE § 34-2-28-0.5-2(a)-(d) (Supp. 1980).

[144]*Id.* § 34-2-28-1(a).

[145]Sharpe v. Baker, 51 Ind. App. 547, 96 N.E. 627 (1911), *petition for rehearing overruled*, 99 N.E. 44 (1912).

[146]IND. CODE § 34-2-28-0.5, -1 (Supp. 1980). The act was carelessly drafted to allow only exemptions permitted by Indiana law and by inference to exclude non-Code federal exemptions, which of course the Indiana legislature cannot do. To this extent the provision is invalid.

[147]*Id.* § 34-2-28-1(e). This subsection makes exempt:

> Any interest the debtor has in real estate held as a tenant by the entireties on the date of the filing of the petition for relief under the bankruptcy code, unless a joint petition for relief filed by the debtor and spouse, or individual petitions of the debtor and spouse are subsequently consolidated.

law and ineffective. Hence, if any sensible interpretation is to be made of the statute, it seems that it was intended to make entireties property exempt for the purpose of eliminating the doubt existing under section 541 of the Code whether the bankrupt's interest in entireties property, whatever it is, will pass to the estate.[148] If made exempt by state law, then the substantial effect is to give entireties property the same status it had under prior Indiana and bankruptcy law—providing that the exemption is claimed. The reference in the exemption statute to joint bankruptcies was probably included to indicate that as under prior law,[149] joint creditors of husband and wife should be allowed to reach entireties property (subject, however, to the homestead exemption). If so construed, this means that the rights of joint and individual creditors with respect to entireties property will effectively remain as they were before the new code, except for the $7,500 homestead exemption allowed each spouse against joint creditors. Thus if H takes bankruptcy, owning by the entireties a home worth $40,000 and has joint creditors with claims of $20,000, then the bankrupt and his wife may claim as exempt $15,000. The joint creditors may reach what is left of the home whether administered in or out of bankruptcy or as a joint bankruptcy. The balance ($5,000) may be claimed as exempt as against the individual creditors whether or not H's interest passes to the estate. Individual creditors may not reach the wife's interest in the property which may be claimed as either exempt or as not subject to creditor process. This can be litigated in H's bankruptcy or in a joint bankruptcy.[150] This solution, of course, is highly speculative.

It should be noted that when a state exemption is allowed or claimed in bankruptcy, its parameters are still controlled by the federal law. Thus, although the general Indiana exemption law is

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[148]Under the Bankruptcy Code it is not clear whether the interest of a debtor, whatever it may be, will pass to the estate in bankruptcy under § 542 of the Code. Under the proposed interpretation of the Indiana exemption law, the entireties owner will be placed in the same position that he was in before its adoption by allowing husband and wife either to claim the exemption allowed by Indiana law or to claim that his interest in the assets does not pass to the trustee. For an excellent discussion of this problem under the Code *see* Note, *The Bankruptcy Code of 1978 and Its Effect upon Tenancies by the Entireties*, 13 IND. L. REV. 761 (1980).

[149]Under prior law entireties property did not pass as estate property since it was owned by the marital unit. But joint creditors could reach it. First Nat'l Bank of Goodland v. Pothuisje, 217 Ind. 1, 25 N.E.2d 436 (1940). In the case of husband and wife consolidated bankruptcies, some referees allowed entireties to be administered so that joint creditors would be paid. The same will be true under the Code. *See generally, In re* Jeffers, No. 79-30724 (N.D. Ind. Feb. 19, 1979) (unpublished opinion of Judge Rodebaugh).

[150]11 U.S.C. § 725 (Supp. II 1978).

limited to contract actions and is made inapplicable to judgments acquired before October 1, 1977, the Code prescribes that the exempt property is "not liable during or after the case for any debt of the debtor" that is provable in bankruptcy.[151] Most tort claims are now provable in bankruptcy.[152]

8. Proceeding Supplemental to Execution.—In the enforcement of a judgment by proceedings supplemental, the court may order the debtor's property of all types applied toward the indebtedness, providing that the property is transferable and subject to creditor process. The order may extend to persons with respect to obligations and funds of the debtor, and it may direct payments of unspecified amounts and payments made dependent upon conditions. Authority for this extraordinary and necessary power is derived from statute and from inherent equity power to afford remedies where execution is not adequate.[153] The workability of this broad power of the court is beautifully illustrated by a group of recent decisions. In *Deetz v. McGowan*,[154] a creditor with a judgment for over $100,000 procured an order against the judgment debtor directing proceeds from the sale of the latter's land to be deposited in an escrow savings account. Pending appeal from the order, the judgment debtor died, and her personal representative claimed the funds to satisfy priority creditors of the estate. The court held that the escrow order in proceedings supplemental created a lien thereon which took priority over estate creditors.[155] *Hudson v. Tyson*[156] allowed a tort creditor with a judgment of $10,000 against a bail bonding company to garnish a deposit of $75,000 which was required by law[157] to be given to the insurance commissioner to assure payment of bond forfeitures.[158] Although the deposit was held to secure payment of bond forfeitures which had a first priority, the court allowed the fund to be "attached," subject to payment when it was established that contingent charges against the fund and the company which had ceased business were less than the deposit.[159] In *Malbin & Bullock, Inc. v.*

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[151]*Id.* § 522(c) (Supp. III 1979).

[152]*Id.* § 502. Although the Indiana exemption law excepts judgments entered before October 1, 1977, such claims also will be discharged under the Code for the same reason.

[153]IND. CODE §§ 34-1-44-1 to -8 (1976); IND. R. TR. P. 69(E).

[154]403 N.E.2d 1160 (Ind. Ct. App. 1980).

[155]*Id.* at 1165. A lienholder's interest in the collateral will survive administration. Paidle v. Hestad, 169 Ind. App. 370, 348 N.E.2d 678 (1976).

[156]404 N.E.2d 636 (Ind. Ct. App. 1980). In this case a bail bondsman shot a bonded client while attempting to bring him in on a bench warrant. The client recovered a judgment against the bondsman and his principal insurance company.

[157]IND. CODE § 35-4-5-35 (1976).

[158]404 N.E.2d at 642.

[159]*Id.* at 641.

Hilton,[160] a tenant who sought to establish a mechanic's lien and instead recovered a personal judgment against a corporate owner of real estate was allowed to garnish an escrow account established with the owner's funds to protect a subsequent purchaser of the property. Garnishment was permitted, although the escrow was created by the successor shareholders to whom all the assets of the corporate owner had been transferred.[161] *American Underwriters, Inc. v. Curtis*[162] allowed a tort creditor who obtained a default judgment to garnish the debtor's liability insurer.[163] In this case the insurer, after a hearing in proceedings supplemental, raised the defenses that the policy was conditioned by statute on a judgment rendered against the insured "after actual trial"[164] and that liability could not be sustained where judgment was procured by the claimant without notifying the liability insurer of the suit. The court disallowed the "actual trial" defense because it was raised too late[165] and determined that nothing in the statute required the tort claimant to notify the insurer of the suit.[166] Finally, *Arnold v. Dirrim*[167] recognized that proceedings supplemental may be used as a vehicle to reach assets which have been fraudulently conveyed by the debtor.[168]

Until a judgment is final, it may not be enforced by execution or proceedings supplemental.[169] A questionable application of this rule

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[160]401 N.E.2d 719 (Ind. Ct. App. 1980). Although the court denied a lien to the creditor, a judgment based upon the contract between the owner and tenant was upheld on pleadings which requested foreclosure of a mechanic's lien.

[161]The court had no trouble in allowing garnishment of assets which passed to the successor shareholders of the corporation, although the basis for the holding was not made clear.

[162]392 N.E.2d 516 (Ind. Ct. App. 1979).

[163]*Id.* at 517-18; *accord*, Allstate Ins. Co. v. Morrision, 146 Ind. App. 497, 256 N.E.2d 918 (1970).

[164]IND. CODE § 9-2-1-5(c) (1976 & Supp. 1980).

[165]The Indiana Supreme Court has indicated that defenses of a garnishee in proceedings supplemental must be pleaded. State *ex rel.* Travelers Ins. Co. v. Madison Superior Court, 265 Ind. 287, 354 N.E.2d. 188 (1970).

[166]392 N.E.2d at 519. Another recent decision recognizes that the liability insurer has no direct fiduciary duty or obligation to settle with a third party injured by the insured at least before judgment against the insured. Winchell v. Aetna Life & Cas. Ins. Co., 394 N.E.2d 1114 (Ind. Ct. App. 1979) (insurer also insured plaintiff). *Accord*, Bennett v. Slater, 154 Ind. App. 67, 289 N.E.2d 144 (1972) (where insurer failed to settle within policy limits, beneficiary with excess judgment against insured could not bring direct suit against insurer), *discussed in* Townsend, *Secured Transactions and Creditors' Rights, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 226, 243 (1973).

[167]398 N.E.2d 442 (Ind. Ct. App. 1979), *discussed at* text accompanying notes 198-200 *infra*.

[168]398 N.E.2d at 447.

[169]De Later v. Hudak, 399 N.E.2d 832 (Ind. Ct. App. 1980) (order to pay marital debt had not become final).

was applied in *Kuhn v. Kuhn*.[170] The court held that decrees awarding future support payments of definite amounts could not, when later in default, be enforced by execution or proceedings supplemental until the amount was liquidated by a court judgment or decree.[171] In making installment decrees unenforceable until further litigation establishes the amount in default, the Indiana Supreme Court has imposed an expensive and harsh burden of relitigation upon the many thousands of mothers who must contend with delinquent support payments.[172] Whether the *Kuhn* rule will apply to property division and other awards payable in fixed installments was not made clear by the case.

9. Enforcement of Property Division and Support Orders.—The supreme court in *Kuhn v. Kuhn*[173] held that an order for periodic support payments of definite amounts is not a final order, so that before it may be enforced by execution or contempt, a new decree or judgment determining the amount of default must be procured.[174] In a sense the court was correct in recognizing that for some purposes, at least, a support order is not final. It may prospectively be modified by later court order;[175] it terminates on emancipation or when the child reaches twenty-one[176] and possibly upon the death of the spouse procuring the award or the death of the child.[177] However, the award is final for purposes of appeal and enforcement by contempt proceedings.[178] The court justified its new rule on the ground that a contrary result would make support orders for future

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[170]402 N.E.2d 989 (Ind. 1980), *considered at* text accompanying notes 173-85 *infra*.

[171]402 N.E.2d at 991. For a discussion of the decision of the court of appeals permitting enforcement of delinquent installments under a support order without a further order liquidating the amount due, *see* Townsend, *1979 Survey*, *supra* note 132, at 390.

[172]One reason for the decision was the possibility, apparently instilled by amicus curiae, that installment support orders would constitute judgment liens on real estate if such orders were considered judgments, a possibility which has been rejected by prior case law and current legislation. *See* discussion at text accompanying notes 179-81 *infra*.

[173]402 N.E.2d 989 (Ind. 1980). For a similar result see De Later v. Hudak, 399 N.E.2d 832 (Ind. Ct. App. 1980) (where proceedings supplemental were denied because the amount owing under a decree to pay a marital debt had not been fixed).

[174]402 N.E.2d at 991.

[175]IND. CODE § 31-1-11.5-17 (1976).

[176]*Id.* §§ 31-1-11.5-12, -17.

[177]*See* Collins v. Gilbreath, 403 N.E.2d 921 (Ind. Ct. App. 1980) (arrearages could not be recovered by stepfather after mother committed suicide—court indicated that right passed to mother's estate).

[178]Before contempt orders are entered, the court, after notice and hearing, must find evidence of a violation of the order. Denny v. State, 203 Ind. 682, 182 N.E. 313 (1932). Contempt is proper for failure to pay support. Rager v. Rager, 222 Ind. 443, 54 N.E.2d 261 (1944).

support payments, liens on property.[179] The 1980 legislature met this concern by prohibiting a court from creating a lien on real estate until the amount delinquent has been fixed by judgment or a copy of the order finding the amount delinquent has been entered upon the lis pendens docket.[180] Also, prior case law holds that property division and support orders directing installment payments do not serve as basis for a judgment lien—at least before the amount owing is fixed.[181] Finally, the court relied upon a statutory provision permissively allowing a court to enter a judgment for unpaid support. This, however, overlooks the fact that this law is simply a restatement of well-recognized equitable power[182] and in the teeth of another statute allowing a decree to be enforced "by all remedies available for enforcement of a judgment including but not limited to contempt. . . ."[183] The court also held that since enforcement of a delinquent support order is not an action upon a judgment (for which the limitation is ten years) the general catch-all statute of limitations of fifteen years applied to bar the remedy.[184] The court failed to consider whether the remedy is equitable and governed by laches and other equitable rules of discretion.[185] The decision thus will not only make enforcement of delinquent payments expensive and difficult, but also will allow family feuds and litigation to simmer for unnecessarily long periods of time.

Other decisions held that the right to collect overdue support payments awarded to a wife pass to her estate when she dies;[186] that unvested pension rights can be considered in a property division award,[187] a result seemingly repudiated by 1980 legislation defining

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[179]402 N.E.2d at 990-91.

[180]Act of Feb. 27, 1980, Pub. L. No. 181, § 1, 1980 Ind. Acts 1574 (currently codified at IND. CODE § 31-1-11.5-13(f) (Supp. 1980)).

[181]Uhrich v. Uhrich, 362 N.E.2d 1163 (Ind. Ct. App. 1977) (property division payable in installments); Myler v. Myler, 137 Ind. App. 605, 210 N.E.2d 446 (1965) (support installments).

[182]Suit may be brought upon an equitable decree to enforce it as in the case of a judgment. Hansford v. Van Auken, 79 Ind. 302 (1881); Princeton Coal & Mining Co. v. Gilchrist, 51 Ind. App. 216, 99 N.E. 426 (1912). Courts have inherent power to issue orders assisting in the enforcement of judgments and decrees. Wilson v. Wilson, 169 Ind. App. 530, 349 N.E.2d 277 (1976).

[183]IND. CODE § 31-1-11.5-17(a) (Supp. 1980).

[184]The Indiana statute of limitations applicable to "judgments" is ten years. IND. CODE § 34-1-2-2(6) (1976). The statute is not limited to judgments for the payment of money, nor is the statute limited to legal judgments. Hence, the court's failure to apply the limitations statute applicable to "judgments" is a newly created and erroneous holding that a support order is not a judgment.

[185]The doctrine of laches may be applicable. *See* Matthews v. Wilson, 31 Ind. App. 90, 67 N.E. 280 (1903) (laches applied to enforcement of lien decreed in favor of wife).

[186]Collins v. Gilbreath, 403 N.E.2d 921 (Ind. Ct. App. 1980).

[187]Irwin v. Irwin, 406 N.E.2d 317 (Ind. Ct. App. 1980) (holding that the unvested pension could be considered in arriving at the proportion of division but not as a part

marital property as including "a present right to withdraw pension or retirement benefits";[188] and that a property division decree giving the husband a lien upon property going to the wife to be paid when the wife decides to sell the property is invalid as improperly delegating authority to the wife.[189]

10. Attachment and Garnishment.—While non-residence of the defendant is grounds for attachment and attachment and garnishment in Indiana,[190] due process, under the rule of *Shaffer v. Heitner*,[191] limits jurisdiction in such cases to situations in which the defendant appears, is personally served within Indiana, is subject to Indiana jurisdiction because of sufficient contacts as required by *International Shoe Co. v. Washington*,[192] or where the plaintiff is suing on a judgment meeting the foregoing requirements.[193] Prior to *Shaffer* it was assumed that *in rem* jurisdiction could be obtained over a tort creditor by attachment and garnishment of his liability insurer in any state where the insurer could be served pursuant to the well known case of *Seider v. Roth*.[194] However, the rule of *Seider v. Roth* was overruled by the United States Supreme Court in *Rush v. Savchuk*.[195] There, a resident of Minnesota brought suit against a resident of Indiana for injuries received in an accident in Indiana by serving and naming the liability insurer of the defendant as garnishee. Because the plaintiff had no direct cause of action against the insurer and other grounds of jurisdiction required by *Shaffer* were not met, an *in rem* judgment for the plaintiff was reversed.[196]

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of the property awarded). *Accord*, Libuano v. Libuano, 388 N.E.2d 574 (Ind. Ct. App. 1979). Irwin also held that a workmen's compensation award received (*but apparently owing before separation*) after final separation should not be included in the property awarded. The 1980 legislature redefined "final separation," the date for determining marital property as the date of the filing of the petition. Act of Feb. 28, 1980, Pub. L. No. 180, § 2, 1980 Ind. Acts 1573 (currently codified at IND. CODE § 31-1-11.5-11 (Supp. 1980)).

[188]Act of Feb. 28, 1980, Pub. L. No. 180, § 1, 1980 Ind. Acts 1573 (currently codified at IND. CODE § 31-1-11.5-2(d) (Supp. 1980)).

[189]Henderson v. Henderson, 401 N.E.2d 73 (Ind. Ct. App. 1980). Other cases, however, upheld a support decree to be adjusted annually by the consumer price index, Branstad v. Branstad, 400 N.E.2d 167 (Ind. Ct. App. 1980), and until the child completes his undergraduate college education diligently pursued, Brokaw v. Brokaw, 398 N.E.2d 1385 (Ind. Ct. App. 1980). But a property division award conditioned on nonremarriage of the wife was held unlawful. Wilhelm v. Wilhelm, 397 N.E.2d 1079 (Ind. Ct. App. 1979).

[190]IND. R. TR. P. 64(B).

[191]433 U.S. 186 (1977).

[192]326 U.S. 310 (1945).

[193]The subject is a lively one. *See, e.g.*, Townsend, *1979 Survey, supra* note 132, at 391.

[194]17 N.Y.2d 111, 216 N.E.2d 312 (1966).

[195]100 S. Ct. 571 (1980).

[196]*Id.* at 573-74.

11. Fraudulent Conveyances.—A creditor may avoid transfers of property subject to creditor process if the transfer was not for fair consideration and was made with intent to defraud creditors by a debtor who is or thereby becomes insolvent.[197] In *Arnold v. Dirrim*,[198] the remedy was allowed in favor of successful members of a class action in which judgment was recovered against a corporate director for violation of the Indiana Securities Act.[199] During the course of the litigation and shortly after commencement of the trial, the director sought to avoid collection of the judgment by a series of transactions in which he conveyed all of his property for inadequate consideration to a family corporation, to his wife, and to a spendthrift trust in which he reserved a joint right to income for life. A finding of intent to defraud creditors was supported by numerous badges of fraud including the contemporaneous, hurried character of the transfers, the inadequacy of consideration, and the fact that the transfers, all made during the pendency of the lawsuit against him, were to close family members with some benefits retained by the debtor. The court further recognized that a transfer for a fair consideration may be avoided as fraudulent if it is taken by the transferee with knowledge of the fraud.[200] The donor's intent also was deemed established by a sanction imposed for failure to submit to a deposition. Insolvency was inferred from the debtor's testimony at the trial that he had no assets.

12. Bulk Sales.—Malbin & Bullock, Inc. v. Hilton[201] seems to recognize that proceeds from a bulk sale of inventory may be reached by a creditor of the seller through proceedings supplemental.

13. Receiverships—Statutory Liquidators.—Liquidation of banks, insurance companies, and the like have been regulated by statutes in most states, leaving control of assets and administrative matters to statutory liquidators whose domiciliary title must be given full faith and credit by other states.[202] *Hudson v. Tyson*,[203]

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[197]IND. CODE § 32-2-1-14 (1976).

[198]398 N.E.2d 442 (Ind. Ct. App. 1979).

[199]*Id.* at 450. In a companion case the Indiana Court of Appeals affirmed the class action judgment in a decision which should be carefully studied by corporate directors. Arnold v. Dirrim, 398 N.E.2d 426 (Ind. Ct. App. 1979).

[200]398 N.E.2d at 447. *See*, IND. CODE § 32-2-1-17 (1976).

[201]401 N.E.2d 719 (Ind. Ct. App. 1980) (holding that proceeds of inventory held by shareholders to whom assets were transferred could be reached—ground not clear).

[202]The fountainhead case is Relfe v. Rundle, 103 U.S. 222 (1880). However, the title of a foreign liquidator is subject to local policy of other states allowing creditors to reach local assets. Clark v. Williard, 294 U.S. 211 (1935). *Cf.*, O'Malley v. Hankins, 207 Ind. 589, 194 N.E. 168 (1935) (Indiana refused local ancillary receiver for local assets and creditors).

[203]404 N.E.2d 636 (Ind. Ct. App. 1980).

however, allowed an Indiana creditor to reach the assets[204] of a foreign insurance corporation allegedly in control of a California liquidator when the debtor corporation failed to prove the judgment vesting the foreign representative with title.[205] An important decision of the Indiana Supreme Court[206] held that a statute requiring the filing of insurance company liquidations with the Marion County Circuit Court is a venue law under Indiana Trial Rule 75, so that commencement in the wrong court was not jurisdictional nor subject to challenge by mandate.[207] A well thought out interpretation of the priority provisions of the insurance liquidation statute is to be found in *Foremost Life Insurance Co. v. Department of Insurance*[208] in which an insurer, who was secondarily liable upon policies reinsured with an insolvent Indiana insurance company,[209] sought to share a class three priority given to insureds and policyholders.[210] The court held that the insurer under the reinsurance agreement was not an "insured" or "policyholder" entitled to a third priority, but to the extent that the insurer paid its policyholders covered by the reinsurance agreement, it was entitled to that status by way of subrogation to the priority class.[211] However, upon equitable principles, subrogation against other policyholders of the third priority was deferred until all policyholders entitled to that priority had been paid in full.[212]

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[204]In this case a creditor was allowed to reach a deposit required by an insurer for the benefit of a particular class of creditors of which the creditor was not a member. *Id.* at 642. Indiana may properly protect local creditors by requiring foreign insurers to deposit funds for their benefit. Fischer v. American United Life Ins. Co., 314 U.S. 549 (1942).

[205]404 N.E.2d at 641. A person suing upon or relying upon a foreign judgment must prove it by introducing a certified copy or by admissions. Shane v. Koehler, 168 Ind. App. 552, 343 N.E.2d 818 (1976).

[206]State *ex rel.* Indiana Life & Health Ins. Guar. Ass'n v. Superior Court, 399 N.E.2d 356 (Ind. 1980).

[207]*Id.* at 358-59. The court held, also, that the Marion County Superior Court was given concurrent jurisdiction with the circuit court. *Id.* at 359 (citing IND. CODE § 33-5-35.1-4 (Supp. 1980)).

[208]395 N.E.2d 418 (Ind. Ct. App. 1979) (opinion by Judge Robertson).

[209]The creditor-insurer in this case had entered into a contractual arrangement whereby its credit life and disability policies would be sold in states where the reinsurer (now in insolvency proceedings) was not authorized to do business. The reinsurer then reaped the profits, if any, paid the insurer a straight commission, and took the risk on the policies. The creditor insurer, however, remained secondarily liable as between the parties recognized in the case as a "quasi-suretyship" arrangement. *Id.* at 422-23.

[210]*See* IND. CODE § 27-1-4-15 (1976). The liquidation and priorities law has been changed and is now codified at IND. CODE § 27-9-3-40(3) (Supp. 1980). However, law of this case remains important under the new statute.

[211]395 N.E.2d at 425.

[212]The court also held that the creditor-insurer or surety in this case was not a guaranty association entitled to third priority under the express terms of the law.

14. Creditors' Rights in Decedents' Estates.—As a general rule a creditor may not share in the assets of a decedent unless an estate is opened within one year and his claim is filed within five months of the first published notice to creditors.[213] In *Anson v. Estate of Anson*,[214] a creditor who also was a disinherited heir was barred by failure to file his claim within the statutory limits from the time of the first newspaper publication to heirs. By statute, newspaper notice to creditors is authorized, but notice to heirs and devisees must be sent by mail.[215] The creditor argued that because his claim was filed within five months of the mailed notice to him as an heir his claim should have been allowed. The mailing had been delayed because of the representative's omission and amendment. The court held that the purpose of the notice provision of the probate code applicable to creditors was validly different from the notice provision required to be given heirs and devisees and that newspaper notice to a creditor who was an heir was all that was required to fix time limits for filing his claim as a creditor.[216] Had the court been completely honest it would have pointed out that the statute is illogical in that there is in fact a greater need to give known creditors mail notice of administration than heirs and devisees.[217] Another decision, *Rising Sun State Bank v. Fessler*,[218] denied relief to a physician who sued the personal representative instead of filing a claim with the probate court within the time limits. In the interests of justice, the court should have ordered the case transferred to the proper court[219] or bound the personal representative on principles of estoppel (which the court held inapplicable under the non-claim statute).

It is a general rule that a person claiming an interest in property

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[213]IND. CODE § 29-1-14-1 (Supp. 1980). Unless administration is commenced within five months of death, real estate may not be sold to pay claims. *Id.* § 29-1-7-15.1 (1976).

[214]399 N.E.2d 432 (Ind. Ct. App. 1980). *See also*, Falender, *Decedents' Estates and Trusts, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 291 (1981).

[215]IND. CODE § 29-1-7-7 (1976). Fairly interpreted, the statute could be construed as requiring mailed notice to creditors as well as heirs and devisees, but because the requirement of mailing follows a sentence prescribing notice to the latter, it was construed as not requiring notice to creditors. 399 N.E.2d at 434-35.

[216]399 N.E.2d at 435.

[217]Because heirs and devisees are closer to the decedent, they are more likely to know of his death than are creditors. It can be argued that notice by publication to known creditors denies them due process of law. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The court, however, relied upon cases indicating that the legislature could make the non-claim statute commence from a time other than upon notice.

[218]400 N.E.2d 1164 (Ind. Ct. App. 1980).

[219]*Cf.*, IND. R. TR. P. 75(B) applied in State *ex rel.* Indiana Life & Health Ins. Guar. Ass'n v. Superior Court of Marion Co., 399 N.E.2d 356 (Ind. 1980) to receivership administration.

held by the decedent is not required to file a "claim" with the estate and the interest therein will continue against distributees and successors from the estate.[220] The rule was recognized in *Deetz v. McGowan*[221] where a lien upon the debtor's interest in an escrowed fund was obtained by a creditor in proceedings supplemental before the debtor's death. The court held that the proceedings could be continued without the necessity of filing a claim with the estate.[222] The lien thus took precedence over priority claims of other unsecured creditors. Another interesting question of the rights of property claimants to assets of the debtor was posed in *Estate of Williams*.[223] There, the decedent owned stock in what appeared to be a closely held corporation under an agreement not to sell to others and to sell to the petitioner upon his death. The petitioner filed an action in the estate to enforce this agreement more than five months after the first published notice to creditors. The court determined that the suit did not involve a "claim" within the non-claim statute.[224] However, the court applied another provision of the Indiana Code allowing persons with "any interest in any property in the possession of the personal representative adverse to the estate . . . [to] file, prior to the expiration of five (5) months after the date of the first published notice to creditors, a petition" with the probate court to establish his title.[225] By construing "may" as "must" the court denied relief on the basis that the statute fixed a cut-off date for establishing property rights in probate proceedings. The court was careful to point out that the statute was a bar to proceedings in probate, leaving the inference that rights to the property after the five month period may be pursued in other courts against distrib-

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[220]Beach v. Bell, 139 Ind. 167, 38 N.E. 819 (1894). Heirs and devisees are not required to file claims with the estate. Rush v. Kelley, 34 Ind. App. 449, 73 N.E. 130 (1905) (claim of widow for statutory allowance). The probate code expressly provides that proceedings to enforce liens are not subject to the non-claim statute. IND. CODE § 29-1-14-1(e) (Supp. 1980); *see* Paidle v. Hestad, 348 N.E.2d 678 (Ind. Ct. App. 1976).

[221]403 N.E.2d 1160 (Ind. Ct. App. 1980), *see* also text accompanying notes 154-55 *supra.*

[222]403 N.E.2d at 1165.

[223]398 N.E.2d 1368 (Ind. Ct. App. 1980).

[224]*Id.* at 1369-70. The petitioner in this case apparently was seeking specific performance of the contract to sell the stock. For some unexplained reason, the court indicated that the doctrine of equitable conversion would not apply to such property. On this point, it is clear that specific performance of an agreement to sell or not to sell close corporate stock is generally granted and the doctrine of equitable conversion applies. *E.g.*, Legro v. Kelley, 311 Mass. 674, 42 N.E.2d 836 (1942). When a purchaser sought specific performance in such a case, the court properly held that his action was not a "claim" within the non-claim statute. *See*, New England Trust Co. v. Spaulding, 310 Mass. 424, 38 N.E.2d 672 (1941).

[225]398 N.E.2d at 1370-71 (applying IND. CODE § 29-1-14-21 (1976)).

utees and successors in administration. In short, the statute frees the probate court from late suits involving title, such as ejectment, replevin, specific performance, rescission and restitution and the like, but without necessarily barring later property remedies against successors and possibly the representative in other courts.[226] Any other interpretation of the case would create chaos with respect to property titles.

In another significant opinion,[227] the supreme court held that a sale of estate property to a personal representative is void unless approved by all interested parties or specifically authorized by will.[228] This decision has an important bearing upon all types of judicial, foreclosure and fiduciary sales, and teaches that purchase of trust property by a fiduciary is improper.

15. Bankruptcy.—Worthless assets of a bankrupt may be abandoned by court order after a hearing.[229] Under the Bankruptcy Code of 1978[230] and prior Bankruptcy Rules,[231] assets which are scheduled but not administered are deemed abandoned when the estate is closed. This latter principle was overlooked by *Zeigler Building Materials, Inc. v. Parkinson*[232] in which the title of the bankrupt was denied because no order of abandonment had been made.[233] In *De Later v. Hudak*,[234] the court of appeals apparently was in contempt of the bankruptcy court by enforcing a property division decree based upon a prior, discharged obligation of the wife.[235] Both under the

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[226]A person claiming an interest in property coming into the possession of the personal representative may recover the property by filing a reclamation petition—at least if it is filed within the five month period. Isbell v. Heiny, 218 Ind. 579, 33 N.E.2d 106 (1941). The probate code expressly forbids foreclosure of liens on real estate until after five months from the death of the decedent unless the representative is diligently prosecuting proceedings to sell the property. IND. CODE § 29-1-14-16 (1976).

[227]*In re* Garwood, 400 N.E.2d 758 (Ind. 1980).

[228]*Id.* at 767.

[229]11 U.S.C. § 554(a) (Supp. III 1979).

[230]11 U.S.C. § 554(c) (Supp. II 1978).

[231]Bankruptcy Rule 608 (1973).

[232]398 N.E.2d 1330 (Ind. Ct. App. 1980) (relying on AM. JUR.).

[233]*Id.* at 1332-33. In this case a bankrupt contractor asserted a cause of action by counterclaim against an owner for whom a home was built. A materialman to whom the contractor owed money intervened and claimed any excess fund owing to the contract under IND. CODE § 32-8-3-9 (1976). Before judgment, the contractor took bankruptcy and was discharged. Among its reasons for disallowing the intervening materialman a right to any surplus retainage owing by the owner was the fact that this surplus, if any, belonged to the trustee in bankruptcy unless there was an order from the bankruptcy court abandoning the property. For further discussion of the case *see* text accompanying note 127 *supra*.

[234]399 N.E.2d 832 (Ind. Ct. App. 1980).

[235]Prior to the divorce, the wife received a discharge in bankruptcy on a claim which she was later ordered to pay in a divorce decree; no appeal was taken. The

Code[236] and pre-Code[237] law, enforcement of discharged claims is stayed, and the new bankruptcy law makes it clear that a judgment procured by a creditor on a discharged claim is void.

16. Suretyship.—Several established suretyship principles were applied in *Gemmer v. Anthony Wayne Bank.*[238] *Gemmer* held that a surety bound upon a negotiable instrument as an indorser under words guaranteeing payment is not entitled to demand or presentment and notice as a condition to liability;[239] the creditor is not required first to bring suit against the principal, absent a condition to this effect in the suretyship contract;[240] consideration is not required in the case of a surety on a negotiable promissory note securing a prior obligation of a third party;[241] and proof that a surety was not to be bound on the instrument must be raised by an affirmative defense.[242] *Whipple v. Dickey*[243] recognized that a paying surety may recover reimbursement from his principal.[244] As previously noted, other recent cases recognized the rule that a debtor selling lien property usually remains liable as a surety,[245] and that action of the lienholder in consenting to the arrangement with the assignee is not such a modification of the contract as to release the surety.[246] Consistent with the general rule that a surety's promise is limited to the terms of his bargain, the guarantor of a tenant's obligations to a landlord under a lease was held not liable on a subsequent note and mortgage on the leased premises given to pay for the construction of a building on the mortgaged property.[247] The construction of the building was permitted but not required by the lease. Erosion of the old rule making keepers of public funds and their sureties insurers

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court held that in proceedings supplemental by the husband to enforce the order, she could not raise the issue of discharge which had been adjudicated by the divorce decree.

[236]11 U.S.C. § 524(a)(1) and (2) (Supp. II 1978).

[237]Bankruptcy Rule 401 (1973).

[238]391 N.E.2d 1185 (Ind. Ct. App. 1979).

[239]*Id.* at 1187 (citing IND. CODE § 26-1-3-416(5) (1976) (rule of the Uniform Commercial Code)).

[240]This is the usual suretyship principle. Barnes v. Mowry, 129 Ind. 568, 28 N.E. 535 (1891).

[241]IND. CODE § 26-1-3-408 (1976) (rule of the Commercial Code).

[242]As between the immediate parties, parol evidence may be admitted to prove that the surety was not to be bound. *E.g.*, Hunter v. First Nat'l Bank, 172 Ind. 62, 87 N.E. 734 (1909); IND. CODE § 26-1-3-306(c) (1976).

[243]401 N.E.2d 787 (Ind. Ct. App. 1980).

[244]The court also held that the creditor was not required to have raised a compulsory counterclaim in a prior proceeding where the obligation did not mature until after the action had commenced.

[245]*See* text accompanying note 42 *supra.*

[246]Boswell v. Lyon, 401 N.E.2d 735 (Ind. Ct. App. 1980).

[247]Orange Co. v. Brown, 393 N.E.2d 192 (Ind. Ct. App. 1979).

when the funds are lost or misapplied[248] was indicated in a recent case holding a financial officer liable only for bad faith in paying out unauthorized funds.[249]

17. Miscellaneous.—Lobbying activity of financial institutions was reflected in 1980 legislation authorizing variable rate (VRM) and rollover (ROM) mortgages or loans by banks, industrial loan and investment companies, savings banks and credit unions.[250] Building and loan associations who were granted VRM authority in 1979 were authorized to make rollover mortgages and loans.[251] The United States Supreme Court in *Ford Motor Credit Co. v. Milhollin*[252] construed the federal truth-in-lending act as not requiring acceleration provisions to be disclosed on the face of a consumer credit sale agreement as a "default, delinquency, or similar charg[e]."[253] In another case,[254] the Indiana Court of Appeals found that a "subject to financing" clause in a real estate contract "impose[s] upon the buyers an implied obligation to make a reasonable and good faith effort to satisfy the condition."[255]

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[248]The root Indiana decision to this effect is Halbert v. State *ex rel.* Bd. of Comm'rs, 22 Ind. 125 (1864). The case has not been overturned except by statute in some instances.

[249]State v. Newbern, 398 N.E.2d 683 (Ind. Ct. App. 1979).

[250]Act of Mar. 3, 1980, Pub. L. No. 176, § 1980 Ind. Acts 1544, *reflected in* IND. CODE §§ 28-1-13.5-1 to -5 (Supp. 1980) (banks); *id.* §§ 28-1-21.5-1, -2, -5 to -7 (building and loan associations); *id.* § 28-6-1-19 (savings banks); *id.* § 28-7-1-17 (credit unions). The law regulates the number and amount of loan changes and requires disclosures to be made to the debtor.

[251]*See* note 1 *supra.*

[252]100 S. Ct. 790 (1980) (settling split of authority recognized in Townsend, *1979 Survey, supra* note 132, at 371 and relying upon administrative interpretations by the Federal Reserve Board).

[253]100 S. Ct. at 794.

[254]Billman v. Hensel, 391 N.E.2d 671 (Ind. Ct. App. 1979) (purchasers denied recovery of $1000 deposit where a contract was conditioned on procurement of a conventional mortgage of $35,000 on a purchase price of $54,000—purchaser failed to procure the loan mainly because he did not have a sufficient down payment to make up the difference).

[255]*Id.* at 673.

XVI. Taxation

J.B. KING*

A. Introduction

During the 1979-1980 survey period, the Indiana Supreme Court and Indiana Court of Appeals handed down several significant decisions in the field of state taxation. One especially gratifying feature of these decisions was the courts' frequent emphasis on a strict construction of the taxing statute, particularly when the state was seeking to find and impose tax liability. Moreover, it appears that the quality of taxpayer litigation continues to improve and that lawyers are discovering that state tax cases are to be litigated with the same care and evidentiary concerns as any product liability, personal injury, or breach of contract case.

One facet of the recent decisions may be of special concern to the two major state tax agencies, the State Board of Tax Commissioners and the Department of Revenue. The courts have continued to recognize that while these agencies, in holding taxpayer hearings, are not subject to the express requirements of the Indiana Administrative Adjudication Act,[1] they are nonetheless subject to basic administrative law hearing requirements. This recognition may indicate that these agencies should re-evaluate their hearing procedures.

On June 30, 1980, the Indiana Supreme Court handed down *Clark v. Lee*,[2] a decision which could become one of the most notable state tax developments in the last decade. In *Lee*, the supreme court held that under certain conditions a class action may be maintained to obtain on behalf of each member of the class a refund of taxes unlawfully imposed upon and collected from the individual members of the class.[3] The availability of class action relief to taxpayers, as now announced by the supreme court, may spark litigation which could conceivably lead to massive recoveries against the state in the future.

B. The Court's Emphasis on Strict Construction of the Tax Statute

In three separate decisions, the Indiana Court of Appeals has stressed the necessity to look first to the language of the governing

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[1]*See* IND. CODE §§ 4-22-1-1 to -30 (1976).

[2]406 N.E.2d 646 (Ind. 1980).

[3]*Id.* at 648-49.

tax statute to determine a question of tax liability. Thus, in *Indiana Department of Revenue v. Glendale-Glenbrook Associates*,[4] the court was confronted with a taxpayer's contention that a partnership, consisting of several individuals and one life insurance company, should not be subjected to the gross income tax. The relevant statute provides in pertinent part: "Every partnership of which one or more of the partners is a corporation shall be liable for the tax imposed by sections 2 and 3 of IC 6-2-1 [the gross income tax] and by this article [the adjusted gross income tax]."[5] The taxpayer reasoned that because the corporate partner, the insurance company, was not itself subject to the gross income tax,[6] it made no sense for the Department to conclude that its participation in the partnership would trigger gross income tax liability for the partnership. The Revenue Department contended that the statute was plain and unambiguous and required no judicial interpretation of legislative intent. The court, responding to the taxpayer's contention that the statutory scheme must be examined as a whole in order for the true ambiguity to appear, stated: "We fear that the taxpayer confuses ambiguity in the wording of a statute, which requires judicial interpretation of legislative intent, with an apparently incomplete or illogical statutory taxing scheme, which requires a legislative overhaul."[7] *Glendale-Glenbrook Associates* is a good lesson for taxpayers and for taxing authorities. In sum, the court of appeals determined that there was no ambiguity in the statutory language and that therefore "[t]he taxpayer's argument, although steeped in logic and equity, ignore[d] the plain reading of the statute."[8]

The court in *Glendale-Glenbrook Associates* is to be commended for not succumbing to the temptation to judicially rewrite the statute in order to reach a more logical result. On the other hand, where such an illogical result pervades the statutory scheme, it would be equally commendable for the taxing authority, itself, to seek legislative clarification.

The basic concept that the language of a taxing statute should be the first determinant of tax liability was also emphasized by the court of appeals in *Park 100 Development Co. v. Indiana Department of State Revenue*.[9] This case again involved an interpretation

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[4]404 N.E.2d 1178 (Ind. Ct. App. 1980).

[5]IND. CODE § 6-3-7-1(b) (Supp. 1980).

[6]Under IND. CODE §§ 6-2-1-7(k), 6-3-2-3(d), and 6-3-7-1(a) (1976 & Supp. 1980), a life insurance company electing to pay the premium tax is excluded from gross income taxation, and the corporate partner in *Glendale-Glenbrook Associates* had so elected. 404 N.E.2d at 1179.

[7]404 N.E.2d at 1179.

[8]*Id.*

[9]388 N.E.2d 293 (Ind. Ct. App. 1979).

and application of the provision,[10] previously quoted,[11] which subjects partnerships having one or more corporate partners to gross income tax liability. However, in *Park 100*, the court's emphasis on a strict construction of the statute operated in favor of the taxpayer and against the Revenue Department.

Park 100 involved the question whether a so-called two-tiered partnership was subject to gross income tax under section 6-3-7-1(b). The concept of "two-tiered partnerships" had been devised by taxpayers to avoid the gross income tax liability imposed by that section. The mechanism was simple; corporations interested in participating in a partnership venture would first form a *partnership* consisting of one or more corporations and possibly one or more individuals (this would be the "first-tier" partnership). The first-tier partnership would in turn become a partner in the formation of an operating partnership which would actually conduct the business enterprise (the so-called "second-tier" partnership). The second-tier or operating partnership would have other partners who could be individuals or even other first-tier partnerships. In *Park 100*, the Revenue Department argued that the two-tiered partnership concept was a subterfuge to avoid section 6-3-7-1(b) and that Park 100 Development Company, a second-tier partnership engaged in the development and management of an industrial park, should be subject to the gross income tax. The court of appeals stated the issue as follows: "Park 100 presents the following issue for our review: whether IC 6-3-7-1(b) applies to a partnership that has as a partner a separate partnership consisting of two corporations."[12] The trial court had adopted the Revenue Department's rationale, but the court of appeals reversed, observing that the trial court had engaged in "an unwarranted and expansive interpretation of the statute."[13] The court once more emphasized that in construing a statute, statutory words are to be "accorded their ordinary significance and commonly accepted meaning."[14] The court further emphasized that a statute levying taxes, such as section 6-3-7-1(b), is "not to be extended by implications beyond the clear import of the language used."[15] The court accordingly concluded that "based upon these rules of statutory construction, we do not feel that Park 100 had a corporate partner within the spirit and intent of IC 6-3-7-1(b)."[16]

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[10]IND. CODE § 6-3-7-1(b) (Supp. 1980).

[11]*See* text accompanying note 5 *supra*.

[12]388 N.E.2d at 295.

[13]*Id.*

[14]*Id.*

[15]*Id.*

[16]*Id.*

As in *Glendale-Glenbrook Associates*,[17] it is probably true that a more logical result could have been reached in *Park 100* if the court had abandoned the unambiguous language of the statute. Courts are often confronted with unambiguous statutory language which, if construed in accordance with its ordinary meaning, would produce an untenably absurd result. In some of those situations, courts will consider the entire context of the taxing statute to reach a reasonable interpretation. Nevertheless, the courts are on solid ground when, as a general principle, they decline to embark on judicial excursions into the field of redrafting tax legislation by judicial interpretation.

In *Indiana Department of State Revenue v. Endress & Hauser, Inc.*,[18] the court of appeals, in interpreting a key provision of the Adjusted Gross Income Tax Act,[19] asserted that "legislatures make the tax statutes and courts enforce them as written, not as departments of revenue may wish they had been written."[20] The issue in *Endress & Hauser* was whether a corporate taxpayer, in computing its adjusted gross income tax liability, was entitled to a net operating loss carry-forward deduction incurred by the taxpayer prior to the date it entered Indiana and became subject to the Indiana adjusted gross income tax.[21] The Revenue Department argued that although the adjusted gross income tax was based on an apportionment of a corporate taxpayer's "taxable income," as defined in section 63 of the Internal Revenue Code,[22] nevertheless a net operating loss carry-forward deduction could not be taken in determining "taxable income" if the loss had been incurred at a time when the taxpayer was not subject to the Indiana tax. The Department's contention was based on the underlying premise that the overriding objective of the law was to impose the adjusted gross income tax on "only business income which is derived from sources within the state of Indiana."[23] The court of appeals agreed that the Department's position was logical and could result in a more equitable distribution of the tax burden, but the court, again resorting to a strict construction of the statutory language, concluded that the Act's definition of "taxable income" was unambiguous.[24] Accordingly, neither the Revenue Department nor the court could modify that definition

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[17]*See* notes 4-8 *supra* and accompanying text.

[18]404 N.E.2d 1173 (Ind. Ct. App. 1980).

[19]IND. CODE § 6-3-1-3.5(b) (Supp. 1980).

[20]404 N.E.2d at 1178.

[21]Endress & Hauser had ceased operations as a Massachusetts corporation in 1973 with a large net operating loss. Subsequently, Endress & Hauser reincorporated as an Indiana corporation. *See* I.R.C. § 368(a)(1)(F).

[22]I.R.C. § 63.

[23]404 N.E.2d at 1176.

[24]*Id.* at 1178.

which unambiguously accorded the taxpayer a deduction for its net operating loss carry-forward based on section 63 of the Internal Revenue Code. The court stated in conclusion: "The Department's remedy lies . . . in legislative changes in the tax laws, not in the judicial construction of a statute whose definition is plain on its face and which can be read in harmony with other tax statutes . . . ."[25]

C. Taxpayer Class Actions

In *Clark v. Lee*,[26] the Indiana Supreme Court affirmed the maintenance of a taxpayer's class action for the refund of unlawfully imposed taxes collected by the Indiana Revenue Department. This decision is startling, and could lead to substantial class action tax refund recoveries against the state in the future. Presumably, resourceful legal representatives of such taxpayer classes will be appropriately rewarded for their successful efforts. From the state's viewpoint, the decision could produce serious revenue concerns but perhaps the time has come to recognize that the small taxpayer can only obtain really adequate representation through the availability and maintenance of a class action.

The principal issue urged by the taxpayers in *Lee* concerned the constitutionality of the Indiana Occupation Income Tax law.[27] The challenged occupation income tax was a local option income tax which had been adopted by only a few local governmental entities. The tax under the statute was imposed on the income of individuals who devoted more than fifty percent of their working time to services performed within the local governmental entity adopting the tax.[28] Although the tax was theoretically imposed on all individuals who met the fifty percent test, as a practical matter, only nonresidents of the state were paying the tax. Indiana residents did not actually pay the tax because of a tax credit provision which provided that an individual's Indiana state income tax liability could be applied as an offsetting credit against any local occupation tax liability.[29] Because a resident's state income tax liability would invariably be greater than any local occupation tax liability, the state tax credit eliminated the latter.

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[25]*Id.*

[26]406 N.E.2d 646 (Ind. 1980).

[27]IND. CODE §§ 6-3.5-3-1 to -14 (1976 & Supp. 1980).

[28]*Id.* § 6-3.5-3-2 (1976) provides that a local government may adopt an ordinance which imposes an occupation tax on employees who are "principally employed in the county." *Id.* § 6-3.5-3-1 (3) defines an "[e]mployee who is principally employed in the governmental entity imposing the tax" as "an employee who devotes more than fifty percent of the time that he works for his employer to services which he provides in the county, city, or town, imposing the occupation income tax."

[29]*See id.* § 6-3.5-3-6.

The taxpayers in *Lee* were residents of Kentucky who worked in Clark County, Indiana, one of the local governmental entities which had adopted the local occupation income tax. Under the Indiana-Kentucky state income tax reciprocity agreement,[30] these taxpayers did not pay Indiana adjusted gross income tax. Therefore, they could not avail themselves of the credit provision but instead were obligated to pay the local occupation tax.

Based on the authority of *Austin v. New Hampshire*,[31] the Indiana Supreme Court declared[32] that the Indiana Occupation Income Tax law, by effectively taxing only nonresidents, was an unconstitutional violation of the privileges and immunities clause of the United States Constitution.[33] In light of *Austin*, the court's decision in *Lee* on the constitutional issue could have been anticipated, but its collateral ruling on the class action question was surely a surprise to most followers of Indiana taxation.

The Kentucky plaintiffs had brought their action for a refund of the unlawfully collected occupation income tax on behalf of themselves and "all persons being nonresidents of, or domiciled without the State of Indiana, while principally employed within the State of Indiana."[34] Each of the named taxpayer plaintiffs had followed the express statutory procedures required for instituting a court action for a tax refund.[35] The trial court had ruled that under Indiana Trial Rule 23(A)[36] and subsection 2 of Indiana Trial Rule 23(B),[37] the named plaintiffs were proper and adequate representatives of the class of nonresident taxpayers who had been obliged to pay the occupation income tax and that the case was properly maintainable as a class action.[38]

On appeal, the state contended that the trial court had erred in ordering the case maintainable as a class action because there had

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[30]*See id.* § 6-3-5-1, -2; KY. REV. STAT. § 141.070(2) (1970 & Supp. 1980).

[31]420 U.S. 656 (1975). *Austin* was also a taxpayer class action challenging a similar tax on the income of nonresidents, the New Hampshire commuters' income tax. See N.H. REV. STAT. ANN. § 77-B:1 to -B:28 (1970 and Supp. 1973). The Supreme Court held that the tax violated the privileges and immunities clause, U.S. CONST. art. IV, § 2, cl. 1. 420 U.S. at 668. The Supreme Court made no mention of the propriety of the class action.

[32]406 N.E.2d at 652.

[33]U.S. CONST. art IV, § 2, cl. 1. provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

[34]406 N.E.2d at 648.

[35]*Id.* at 649. The administrative procedures were provided in IND. CODE §§ 6-3-6-2, -4, -3.5-3-11.5(4) to -11.5(7) (1976). *Id.* §§ 6-3-6-2, -4 were repealed by Act of Mar. 3, 1980, Pub. L. No. 61, § 15, 1980 Ind. Acts 660, effective Jan. 1, 1981. For the current provisions, *see* IND. CODE §§ 6-8.1-9-1 to -3 (Supp. 1980).

[36]IND. R. TR. P. 23(A).

[37]IND. R. TR. P. 23(B)(2).

[38]406 N.E.2d at 648.

been no showing to the trial court that all the members of the putative class, that is, all nonresident workers who had paid the occupation income tax, had exhausted their statutory administrative remedies.[39] Although acknowledging that a trial court is without jurisdiction to determine the legality of the imposition of a tax unless the plaintiff has exhausted administrative remedies, the supreme court answered the state's contention thusly:

> In the situation with which we are confronted, the named plaintiffs personally satisfied the jurisdictional requirements of the statute by exhausting their administrative remedies before bringing their action. In so doing they afforded the state government the opportunity of reckoning with their claim. The claim itself was constitutional in nature and sought to void the statute because it discriminated against a class to which plaintiffs belonged, namely, non-residents. It was by its nature a claim which would, if successfuly prosecuted by a lone plaintiff, provide a basis for classwide relief in the absence of certification. We, therefore, conclude that the certification of this action as a class action does not vitiate or evade the jurisdictional requirements of the statute and is not contrary to the case law cited. The action satisfied all of the requirements of Trial Rule 23(A) and the requirement of subsection 2 of Trial Rule 23(B), and therefore the trial court did not err in ordering the case maintainable as a class action.[40]

On the surface, the supreme court's conclusion that the case was maintainable as a class action seems inherently fair and appropriate. As the court observed, the state had been afforded its day in court to respond to the singular legal issue affecting all members of the class.[41]

While seemingly fair and appropriate, the court's decision may produce a number of problems yet to be identified. For example, how is the three-year statute of limitations for the filing of refund claims[42] to be applied to class actions? This statutory requirement serves two crucial functions: First, it cuts off claims against the state after the elapse of three years, and second, it serves as notice

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[39]In support of this contention, the state cited three cases: State *ex rel.* Indiana Dep't of State Revenue v. Marion Circuit Court, 255 Ind. 501, 265 N.E.2d 241 (1971); Marhoefer Packing Co. v. Indiana Dep't of State Revenue, 157 Ind. App. 505, 301 N.E.2d 209 (1974); Cooper v. County Bd. of Review, 150 Ind. App. 232, 276 N.E.2d 533 (1972).

[40]406 N.E.2d at 649.

[41]*Id.*

[42]IND. CODE § 6-8.1-9-1 (Supp. 1980).

to the state of the dollar amount of revenues which may have to be refunded. Obviously, the state must be able to project its revenue requirements with some degree of certainty. The added exposure to taxpayer class action refund recoveries may prove to be a serious complicating factor.

Another possible problem could concern the handling of refund claims awarded pursuant to a class action judgment in instances where an individual member of the class is in fact a delinquent taxpayer. Perhaps the courts, in awarding class action judgments, should specify that any refund awarded to an individual member of the class shall be first applied to any tax liability then delinquently due and owing by such class member.[43]

While the sheer massiveness of a taxpayer class might create awesome procedural problems, perhaps the fundamental requirements of Indiana Trial Rule 23 will afford the most satisfactory basis for resolving issues affecting large numbers of taxpayers. Trial Rule 23 provides a means to handle problems relating to manageability of large groups, adequacy of the class representatives, and the necessity for notice.

Finally, it should be noted that the supreme court in *Lee* also sustained the trial court's award of attorney fees to the named plaintiffs' attorneys.[44] As the supreme court observed, the trial court's award was entirely consistent with its finding that the action was properly maintainable as a class action.[45]

Although *Lee* certainly suggests the establishment of a new horizon for state tax litigation, one note of caution is necessary. The court, in holding that the case was maintainable as a class action, did emphasize that the "claim itself was constitutional in nature and sought to void the statute."[46] While it does not appear from the balance of the court's opinion that its holding was intended to be restricted to the maintenance of class actions raising constitutional issues, there is a strong implication that the courts will look to the nature of the issue when determining whether a taxpayer action is maintainable as a class action. To be sure, it presents a fertile field for tax litigation.

D. Other Significant Gross Income Tax Decisions

In *Indiana Department of State Revenue v. Food Marketing*

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[43]*See id.* § 6-8.1-9-2.

[44]406 N.E.2d at 649.

[45]*Id. See* IND. R. TR. P. 23(D)(5).

[46]406 N.E.2d 649.

Corp.,[47] the court of appeals was faced with the question of the proper computation of a wholesale grocer's gross earnings for imposition of the gross income tax. This question specifically involved a special gross income tax rate classification[48] which permits "wholesale grocers who are engaged in the business of selling stocks of groceries, tobacco products and expendable household supplies" to report and pay gross income tax based on their "gross earnings . . . derived from wholesale sales of stocks of groceries, tobacco products and expendable household supplies to retail food establishments."[49] "Gross earnings" is defined in the statute as the taxpayer's gross receipts from such wholesale sales "less the cost of the stock of groceries, tobacco products and expendable household supplies sold."[50]

The precise issue in *Food Marketing* was whether a wholesale grocer was entitled to deduct its warehousing costs, buying costs, turnover costs, and building expenses in computing its gross earnings. The Revenue Department argued that the statutory deduction for the wholesale grocer's "cost of stock sold" only permitted a deduction for initial acquisition expense and freight-in expense.

In a split decision, the majority of the court held that the statutory term "cost of the stock . . . sold"[51] was broader than the concept argued by the Revenue Department.[52] The majority pointed out that if the legislature had intended to limit the deduction to initial acquisition costs, as urged by the state, it could have employed such appropriate language as "invoice cost," "original acquisitional cost," or "purchase cost."[53] The majority stated: "Instead, the Legislature used the term 'cost of the stock . . . *sold*' which logically includes those items necessary to prepare the products for resale as argued by Food Marketing."[54]

The majority also emphasized that because the wholesale grocer's provision was a tax imposition provision, it should be construed against the state and in favor of the taxpayer. The court accordingly ruled that the grocer was entitled to deduct the additional preparation costs in computing its gross earnings.[55]

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[47]403 N.E.2d 1093 (Ind. Ct. App. 1980).

[48]IND. CODE § 6-2-1-1(s) (Supp. 1980).

[49]*Id.*

[50]*Id.*

[51]*Id.*

[52]403 N.E.2d at 1097.

[53]*Id.* at 1096.

[54]*Id.*

[55]*Id.* at 1097. Judge Staton, in his lengthy dissent, took vigorous issue with the majority's application of the plain meaning rule and the majority's determination that deduction provisions are to be construed against the state. *Id.* at 1097-1103 (Staton, J., dissenting).

In *Indiana Department of State Revenue v. Northern Indiana Steel Supply Co.*,[56] the plaintiff brought suit for a refund of gross income tax paid in connection with its sale of certain heavy equipment in 1971. The issue before the court was whether Northern Indiana Steel could, in computing gross income tax liability, deduct from the purchase price the amount which it owed on the equipment at the time of sale. Under the terms of sale, the indebtedness had been assumed by the purchaser.

The gross purchase price for the equipment was $405,319.80; the amount owed on such equipment was $383,163.50, a portion of which was payable pursuant to a conditional sale contract with the balance being subject to various security agreements. At the closing, the purchaser had assumed the outstanding indebtedness on the equipment and had made a cash payment of $22,156.30, for the balance of the $405,319.80 purchase price.

Following an audit the Revenue Department assessed gross income tax on the total purchase price of $405,319.80.[57] In its refund claim Northern Indiana Steel contended that it was not taxable on the amount of indebtedness ($383,163.50) which its purchaser had assumed. The court of appeals sustained Northern Indiana Steel's contention and held it was not subject to gross income tax on the amount of the indebtedness assumed by the purchaser.[58]

The court's holding is entirely consistent with the supreme court's earlier decisions in *Indiana Department of State Revenue v. Colpaert Realty Corp.*[59] and *Department of State Revenue v. Crown Development Co.*[60] The supreme court recognized in each case that, in the sale of real estate subject to a mortgage encumbrance, the purchaser's assumption of the mortgage debt, and his agreement to pay off that debt, was not a taxable constructive receipt to the seller.[61]

As in the *Colpaert Realty* and *Crown Development* decisions, the court in *Northern Indiana Steel* reasoned that the purchaser's

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[56]388 N.E.2d 596 (Ind. Ct. App. 1979).

[57]The Revenue Department based its assessment on IND. CODE § 6-2-1-1(m) (Supp. 1980) which provides that gross income includes "gross receipts received from the sale, transfer, or exchange of property, tangible or intangible, real or personal, including the sale of capital assets." *Id.* § 6-2-1-1(h) defines "receipt" as "the gross income in cash, notes, credits or other property which is received by the taxpayer or is received by a third person for his benefit." Finally, *id.* § 6-2-1-1(i) defines "receive" or "received" as "the actual coming into possession of, or the crediting to, the taxpayer of gross income . . ., or the payment of his expenses, debts, or other obligations by a third party for his direct benefit."

[58]388 N.E.2d at 600.

[59]231 Ind. 463, 109 N.E.2d 415 (1952).

[60]231 Ind. 449, 109 N.E.2d 426 (1952).

[61]231 Ind. at 472, 109 N.E.2d at 419; 231 Ind. at 459-60, 109 N.E.2d at 430.

assumption of the debt was not taxable as a constructive receipt because, under the express language of the statute,[62] an assumption of indebtedness would be a taxable gross receipt *only* if the assumption were for the "direct benefit" of the former debtor-taxpayer. The court quoted from *Colpaert Realty* as follows:

> Considering the relative advantages flowing to the respective parties, it seems to us that where a purchaser assumes and agrees to pay a debt secured by mortgage, the *direct* benefit to be derived from the subsequent payment of it must be said to flow to the purchaser, and the benefit flowing to the grantor-mortgagor is secondary, incidental, consequential and remote, and therefore indirect within the meaning of the statute.[63]

Another gross income issue arose in *Indiana Department of Revenue v. Waterfiled* [*sic*] *Mortgage Co.*[64] Waterfield was engaged in the mortgage banking business. Waterfield originated mortgage loans which would be assembled into a block of mortgage loans for sale to a third-party investor. The transaction, known as "warehousing," would begin with a number of banks advancing funds to Waterfield. After closing, each mortgage would be assigned to a particular bank, and Waterfield would continue to service the mortgages, for a fee, by collecting mortgage payments from the mortgagors and transferring these payments, including interest, to the mortgagee banks. Waterfield would not send the mortgagors' checks directly to the banks. Rather, Waterfield would deposit the funds in a custodial account and, at the end of each billing period, Waterfield would send one of its own checks for the amount due to each bank. The Revenue Department contended that the interest portions of the mortgage payments constituted gross income to Waterfield.

After reviewing the evidence presented to the trial court, the court of appeals affirmed the trial court's ruling that Waterfield was serving in an agency capacity for the various banks it represented.[65] Therefore, the interest payments on the mortgage loans which Waterfield received in servicing the mortgages were not taxable gross receipts to Waterfield.

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[62]IND. CODE § 6-2-1-1(i) (Supp. 1980).

[63]388 N.E.2d at 598 (quoting 231 Ind. at 478, 109 N.E.2d at 421-22).

[64]400 N.E.2d 212 (Ind. Ct. App. 1980).

[65]*Id.* at 215. *See also* 45 IND. AD. CODE § 1-1-54 (1979) which provides that "[t]axpayers are not subject to gross income tax on income they receive in an agency capacity."

E. Indiana Sales and Use Tax

In *Indiana Department of State Revenue v. Harrison Steel Castings Co.*,[66] the court of appeals considered the issue of sales tax exemptions in a manufacturing context. The company purchased safety equipment which it provided to its employees in its steel casting business. The company then asserted that the equipment qualified for exemption from the Indiana sales tax as "[s]ales of manufacturing machinery, tools and equipment to be *directly used* by the purchaser in the *direct* production, manufacture, fabrication, assembly, extraction, mining, processing, refining or finishing of tangible personal property . . . ."[67] The Revenue Department, after an audit, assessed the company for excluding the items in computing its sales and use tax. The company paid the amounts and brought suit for a refund. The trial court held the property exempt.

The court of appeals, however, reversed the decision.[68] The court reviewed its prior decisions on the same exemption provision, *Indiana Department of State Revenue v. RCA Corp.*[69] and *Indiana Department of State Revenue v. American Dairy, Inc.*,[70] as well as the Revenue Department's sales tax regulation.[71] The court concluded:

> We observe that the Department's interpretation of direct use involves a "positive effect" and an "active causal relationship" to the production process. Our holdings in *American Dairy* and *RCA* certainly seem to follow this strict interpretation. We, thus, determine that the use of safety equipment in the production process is not a "direct use" as it does not have a positive effect and active causal relationship to the production of a product.[72]

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[66]402 N.E.2d 1276 (Ind. Ct. App. 1980).

[67]IND. CODE § 6-2-1-39(b)(6) (1976) (emphasis added) (repealed 1980) (currently codified at IND. CODE § 6-2.5-5-3 (Supp. 1980)).

[68]402 N.E.2d at 1278.

[69]160 Ind. App. 55, 310 N.E.2d 96 (1974).

[70]167 Ind. App. 367, 338 N.E.2d 698 (1975).

[71]IND. AD. RULES AND REGS. (6-2-1-39) -15 (Burns Code ed. 1972) (currently codified at 45 IND. AD. CODE § 2-3-15 (II) (1979)) provides an explanation of direct use:

> In determining whether property is directly used, consideration must be given to the following factors:
>
> (A) The physical proximity of the property in question to the production process in which it is used;
>
> (B) The proximity of time of use of the property in question to the time of use of other property used before and after it in the production process;
>
> (C) The active causal relationship between the use of the property in question and the production of a product.

[72]402 N.E.2d at 1278.

This holding is certainly consistent with *American Dairy* and *RCA*. It is also clear that the court was influenced by "the well-settled principal that in construing an ambiguity in a taxation exemption statute, the statute must be strictly construed against the taxpayer."[73] However, it is submitted that in *Harrison Steel* the court has perpetuated an unwarranted emphasis on the double use of the word "direct" in the tax exemption provision and simultaneously ignored the fact that this statutory sales tax exemption expressly applies to "machinery, tools *and equipment*."[74]

Adopting the reasoning of *RCA*, the court accepted without challenge the Revenue Department's interpretation that the test for the statutory exemption required that the article "have a 'positive effect' and an 'active causal relationship' to the production process."[75] What the court continues to overlook is that the Revenue Department itself has contradictorily disregarded its own test when it recognizes that conveyor systems, lift trucks, cranes, and other kinds of hoists used in the production cycle, but which have no "active causal relationship" to the product, are exempt under this statutory provision.

It is submitted that the court's emphasis in *RCA*, *American Dairy*, and *Harrison Steel* on the "double direct" test reflects a misplaced zeal to obtain a literal statutory interpretation. It is agreed that "direct" means "direct," whether stated once, twice, or three times. Unfortunately, in attempting to make some sense out of the double use of the word "direct," the courts have ignored the fact that the Indiana sales tax exemption for production materials expressly encompasses more than raw input or machinery. The Indiana statute includes an exemption for "equipment."[76] In construing the Indiana gross income tax, the court of appeals has recognized that the term "equipment" includes "[w]hatever is needed in equipping; . . . the articles comprised in an outfit; . . . equipage."[77] Consequently, when the manufacturing exemption literally includes "equipment," that is, that which is necessary to comprise the production output, it logically follows that the safety equipment, as well as the humidity and temperature control equipment, should be deemed exempt. While an exemption provision is to be construed

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[73]*Id.* at 1277.

[74]IND. CODE § 6-2-1-39(b)(6) (1976) (emphasis added) (currently codified at IND. CODE § 6-2.5-5-3 (Supp. 1980)).

[75]402 N.E.2d at 1278.

[76]IND. CODE § 6-2-1-39(b)(6) (1976) (currently codified at IND. CODE § 6-2.5-5-3 (Supp. 1980)).

[77]Department of Treasury v. Ranger-Cook, Inc., 114 Ind. App. 107, 113, 49 N.E.2d 548, 550 (1943) (citing WEBSTER'S NEW INT'L DICTIONARY 865 (2d ed. 1937)).

strictly against the taxpayer,[78] this rule of statutory construction only applies in the case of an ambiguity[79] and the inclusion of "equipment" in the Indiana exemption is sufficient to dispel the existence of an ambiguity which would justify the court's narrow focus on the term "direct."

The second issue in *Harrison Steel* concerned the trial court's rejection of the Revenue Department's attempt to impose a penalty[80] against Harrison Steel. The Department argued that the taxpayer was subject to a penalty for its failure to timely pay the tax, even though the trial court had found the taxpayer had a reasonable basis for not paying the tax. The court of appeals examined the "negligent or intentional disregard" standard set forth in the applicable penalty statute,[81] and concluded that Harrison Steel had acted in good faith and had paid all taxes that it reasonably thought were owed. Therefore, the trial court's refusal to impose a penalty was affirmed.[82]

In *State Department of Revenue v. Calcar Quarries, Inc.*,[83] the taxpayer was engaged in a stone quarry, concrete and asphalt business. In connection with its quarry business, Calcar often delivered crushed stone in Calcar trucks operated under certificates of public convenience and necessity issued by the Indiana Public Service Commission. Calcar claimed that in delivering crushed stone it was engaged in public transportation and that its purchases of trucks and supplies for such transportation were exempt from the Indiana sales tax under the public transportation sales tax exemption provision.[84]

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[78]402 N.E.2d at 1277.

[79]*Id.*

[80]IND. CODE § 6-2-1-16(f) (Supp. 1980) (repealed effective Jan. 1, 1981). *See id.* §§ 6-8.1-1-1 to -11-1 (new tax administration provisions effective Jan. 1, 1981). *Id.* § 6-8.1-11-1 defines the transitional retroactivity.

[81]*Id.* § 6-2-1-16(d) (repealed effective Jan. 1, 1981).

[82]402 N.E.2d at 1282. *See* IND. CODE § 6-8.1-10-2 (Supp. 1980) sets out the penalty provisions effective January 1, 1981. *Id.* § 6-8.1-10-2(d) provides:

> If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on his return, timely remit tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department *shall waive* the penalty.

(Emphasis added.) *Id.* § 6-8.1-10-2(e) provides the procedural method for substantiation of the taxpayer's reasons to avoid a penalty. *Id.* § 6-8.1-10-2(f) expressly enables the Department of Revenue to adopt its own regulations to define terms used such as "negligence" and "reasonable cause." It remains to be seen what role "good faith" or reasonable conduct will play in future tax cases.

[83]394 N.E.2d 939 (Ind. Ct. App. 1979).

[84]IND. CODE § 6-2-1-39(b)(4) (1976) (currently codified at IND. CODE § 6-2.5-5-27 (Supp. 1980)).

The court of appeals upheld the trial court's ruling that Calcar was eligible to claim the public transportation exemption for its trucks, because Calcar had operated the trucks pursuant to certificated authority received from the Public Service Commission and the activity involved constituted public transportation.[85]

The second issue in *Calcar Quarries* involved the same sales tax manufacturing exemption provision applied in *Harrison Steel*.[86] The court again reviewed its earlier holding in *RCA*. However, the court concluded that items such as supplies and repairs of bins, parts for stock trucks, and a tractor-loader which transferred crushed stone from the quarry to the bins for the production of asphalt or concrete, were all "directly used in direct . . . production"[87] of the asphalt or concrete and therefore were exempt from the sales tax.[88] The court of appeals stressed that the trial court, in its findings of fact, had expressly found that Calcar was engaged in one continuous flow of production from its quarry operations to its concrete or asphalt manufacturing activities.[89]

Calcar Quarries may become a useful precedent for taxpayers with integrated production operations. It may also begin to erode the hypertechnical test announced in *RCA* that exempt machinery, tools, and equipment must have a "causal effect" on the product being manufactured.[90] In *Calcar Quarries*, the court retarded the

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[85]394 N.E.2d at 941. *See* 45 IND. AD. CODE § 2-3-13 (1979).

[86]IND. CODE § 6-2-1-39(b)(6) (1976) (repealed 1980) (currently codified at IND. CODE § 6-2.5-5-3 (Supp. 1980)). *See* text accompanying notes 66-79 *supra*.

[87]394 N.E.2d at 943.

[88]*Id.*

[89]*Id.* During the final editing of this Article, the Second District of the Indiana Court of Appeals decided Indiana Dep't of State Revenue v. Cave Stone, Inc., 409 N.E.2d 690 (Ind. Ct. App. 1980), which almost directly contradicts *Calcar Quarries*. In *Cave Stone*, the court held that transportation equipment used to transport crude stone from the quarry to a stone crusher and transportation equipment used to transport the crushed stone from the crusher to stockpiles were taxable as not being "directly used in direct processing." *Id.* at 696. The court said:

> Transportation equipment which merely serves as a means for a product to go from one step to another does not have a positive effect and causal relationship to the production of the graded stone. We hold "directly used in direct processing" requires the transportation equipment be an integral part of a process which is ongoing during the transportation. Here the stone, while being transported, remains unaffected by processing.

Id. At the time of this writing, a petition for rehearing has been filed in *Cave Stone* pointing out to the court the inconsistency of its holding with that of *Calcar Quarries*. Carried to its logical extreme, *Cave Stone* would deny exemption to all kinds of conveying equipment (overhead cranes, hoists, fork lift trucks, and conveyor belts) used to convey actual work in process between production points. The future of *Cave Stone* could be very significant.

[90]*See* text accompanying note 72 *supra*.

Revenue Department's persistent effort to restrict the sales tax exemption for production machinery to an artificially narrow concept. Hopefully, there will be some further developments to restore a more practical and common sense construction to the manufacturing exemption.

In *Indiana Department of State Revenue v. Martin Marietta Corp.*,[91] the issue arose whether freight charges advanced by Martin Marietta to its customers were subject to the Indiana sales tax as part of the sales price of the goods sold.[92] The freight charges were separately invoiced and no profit was realized upon reimbursement. The court of appeals held that the freight charges were the liability of Martin Marietta's customers.[93] The court accordingly concluded that the reimbursements of such freight charges to Martin Marietta were not part of the sales price and therefore were not subject to the sales tax.[94]

F. Adjusted Gross Income Tax

The decision in *Indiana Department of State Revenue v. Continental Steel Corp.*[95] is a sequel to *Indiana Department of Revenue v. Kimberly-Clark Corp.*[96] handed down during the last survey year. *Continental Steel* also involved the question whether the activities of Continental's sales personnel in seventeen foreign states exceeded mere solicitation so as to subject Continental to income tax liability in those states notwithstanding the protection of Public Law 86-272.[97] Continental Steel is an Indiana corporation, but if Continental's out-of-state salesmen were engaged in selling activities involving more than mere solicitation, then its sales delivered into those states from Indiana points of origin would not become a part of Continental's adjusted gross income taxable by Indiana under the state's "sales factor" tax apportionment formula.[98]

The court observed that the Continental salesmen in the seven-

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[91]398 N.E.2d 1309 (Ind. Ct. App. 1979).

[92]IND. CODE § 6-2-1-1(k) (Supp. 1980).

[93]398 N.E.2d at 1313 (citing IND. CODE §§ 26-1-2-308, -401(2)(a) (1976)).

[94]398 N.E.2d at 1313. *See* 1972 Op. Ind. Att'y Gen. 10-12.

[95]399 N.E.2d 754 (Ind. Ct. App. 1980).

[96]375 N.E.2d 1146 (Ind. Ct. App. 1978) *discussed in* Weinstein, *Foreword: Indiana Taxation, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 1, 28 (1980).

[97]15 U.S.C. § 381 (1976) (providing that income derived from interstate commerce is not subject to taxation by a state in which the taxpayer's activity amounts to mere solicitation).

[98]IND. CODE § 6-3-2-2(e) (1976). The "sales factor" (total sales attributed to Indiana divided by total sales everywhere) is used to determine the portion of income taxable by Indiana.

teen states engaged in various selling activities: they adjusted customers' complaints, helped customers design special orders, gave technical help to customers, helped customers assemble catalogs, checked inventories, and occasionally made collections. The court concluded that these kinds of activities constituted "solicitation plus" activities and, that, under *Kimberly-Clark*, Continental's sales into such states from Indiana origins were not to be added to the Indiana numerator of the sales factor under the so-called "throwback rule."[99]

Two observations are worthwhile about *Continental Steel*. First, the court affirmatively acknowledged that the application of the "throwback rule" depended only upon a determination whether the taxpayer was engaged in activities which made the taxpayer liable for taxation by the foreign state of destination. It made no difference whether the taxpayer was *in fact paying taxes* to that state.[100] The question is whether the taxpayer is *taxable* in the foreign state and not whether the taxpayer has in fact been *taxed* by the foreign state.

The second observation is actually a belated protest to the tide of decisions[101] being handed down throughout the country applying the "solicitation plus" test in determining the applicability of Public Law 86-272. It is not possible within this survey to elucidate a total rebuttal to the unfortunate development of this case law. However, it is this writer's observation that the "solicitation plus" test is a wholly artificial and unrealistic concept. It is difficult to believe that Congress intended to restrict the protections of federal law to corporations whose salesmen engaged only in mere solicitation. Surely Congress understood that the ordinary and habitual practice of salesmen in 1959, and for many years prior thereto, included such routine selling functions as listening to customers' complaints, looking at customers' inventories, accepting customer payments from time to time, and rendering technical assistance to a customer's personnel. The strict "solicitation plus" test naively restricts the activities of a salesman to a sterile, unnatural environment never intended by the Congress. Nevertheless, *Continental Steel* is consistent with the majority of state court decisions now available on this point.

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[99]399 N.E.2d at 759. Application of a "throwback rule" would allow the Indiana Department of Revenue to add back the sales which the corporation, in computing its tax, had allocated elsewhere. IND. CODE § 6-3-2-2(n) (1976) provides two instances where an Indiana taxpayer may properly allocate sales and income to another state.

[100]399 N.E.2d at 758.

[101]*See, e.g.*, Miles Laboratories, Inc. v. Department of Revenue, 274 Or. 395, 546 P.2d 1081 (1976); Deseret Pharmaceutical Co. v. State Tax Comm'n, 579 P.2d 1322 (Utah 1978).

G. Ad Valorem Property Tax Decisions

In *State Board of Tax Commissioners v. Aluminum Co. of America*,[102] Alcoa brought an action challenging the Board's reassessment of its manufacturing inventories. The basic question presented was whether Alcoa was required to value aluminum ingots at their full manufactured value including overhead costs attributable to their production. The ingots had been manufactured at one plant and delivered to another plant for fabrication. Under the applicable regulation,[103] the Tax Board had allowed manufacturers to value their work in process and finished goods inventories pursuant to an alternative valuation procedure based on the raw material costs and direct labor expense incurred in the production of such inventories. However, the Tax Board contended that products manufactured at one plant of a taxpayer and shipped to another plant for further fabrication were to be valued at full manufactured cost, the regular valuation method, rather than at a valuation based only on direct labor and material costs as permitted by the alternative method for work in process and finished goods inventories. Alcoa charged that the Board's refusal to allow Alcoa to use the alternative method for valuing ingots produced at one plant and delivered to another plant for fabrication was contradictory to the Tax Board's own regulation. Alcoa argued that its Indiana plants were collectively engaged in one integrated operation and that consequently it should be permitted to value its inventories, wherever located, on the alternative direct labor and materials basis.

The court of appeals noted that, under the Tax Board's contention, ingots manufactured at one plant site and shipped to another plant for fabrication would be taxed at substantially different values than ingots which had, in fact, been manufactured at the second plant site even though the first class of ingots, those shipped to the fabricating plant site, were in all other respects comparable to the second class of ingots.[104] The court concluded that the Tax Board's regulation did not provide for a different valuation method for ingots produced at one plant and shipped to another plant for further processing.[105] Consequently, the court held that Alcoa's reporting of its inventory was correct and consistent with the Tax Board's regulation.[106] The court, in reaching this conclusion, observed that a taxing authority may not abandon its own regulations.

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[102]402 N.E.2d 1316 (Ind. Ct. App. 1980).

[103]50 IND. AD. CODE §§ 4-3-1 to -10 (1979).

[104]402 N.E.2d at 1321.

[105]*Id.*

[106]*Id.*

The second issue in *Alcoa* involved the timeliness of the Tax Board's assessment for the 1974 returns. The court once again criticized the Tax Board's efforts to characterize its audit procedures as constituting a "hearing"[107] within the requirement of the statute[108] which mandates a hearing before the issuance of a final Notice of Assessment. The court said, "Due process requires that a hearing must encompass more than a mere audit or . . . investigation."[109] The court concluded that Alcoa had not been accorded a timely hearing by the Tax Board[110] and, accordingly, the Board's issuance of an assessment for 1974 occurred after the appropriate limitation period[111] had run.

The decision in *Stokely-Van Camp, Inc. v. State Board of Tax Commissioners*[112] presented the opportunity for a comprehensive judicial review of the statutory assessing procedure for inventories of taxpayers described as "first processer[s] of perishable horticultural products."[113] However, the court of appeals summarily disposed of the appeal by holding that the Tax Board's reassessment of Stokely was invalid because the Board had failed to enter written findings in support of its order.[114] The court of appeals remanded the case to the trial court with instructions to set aside the final assessment and to remand the case to the Board for written findings in support of any reassessment of Stokely.[115] *Stokely-Van Camp* is a significant decision because the court specifically held that although the State Tax Board had been explicitly excluded from the hearing requirements of the Administrative Adjudication Act,[116] the Board should nevertheless have made written findings in support of its reassessment order.[117] In reaching that conclusion, the court stated:

> The practical reasons for requiring administrative findings are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, irrespective of a statutory requirement. The reasons have to do with facilitating judicial review, avoiding judicial usurpation of administrative consideration, helping parties

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[107]*See* Whirlpool Corp. v. State Bd. of Tax Comm'rs, 167 Ind. App. 216, 338 N.E.2d 501 (1975).

[108]IND. CODE § 6-1.1-14-11 (1976).

[109]402 N.E.2d at 1323.

[110]*Id.*

[111]IND. CODE § 6-1.1-16-1 (1976).

[112]394 N.E.2d 209 (Ind. Ct. App. 1979).

[113]*Id.* at 210. *See* IND. CODE § 6-1.1-3-13 (1976).

[114]394 N.E.2d at 211.

[115]*Id.*

[116]*See* IND. CODE § 4-22-1-2 (1976).

[117]394 N.E.2d at 210-11.

plan their cases for rehearings and judicial review, and keeping agencies within their jurisdiction.[118]

H. Indiana Intangibles Tax

One of the most important Indiana state tax decisions handed down during the 1979-1980 survey period was *Meridian Mortgage Co. v. State*.[119] This case not only involves a significant intangibles tax question but the court of appeals, in reaching its specific holding, also emphasized the principle that in state tax matters the taxing authorities must look to the substance of the transaction and not be blinded by the formalities or "form" of the transaction.[120]

The specific issue before the court was whether Meridian Mortgage, a mortgage broker which originated and serviced home mortgage loans for banks, title insurance companies and permanent investors, was the owner or the person controlling such mortgage loans so as to be liable for intangibles tax thereon.[121] Basically, Meridian Mortgage would find and assist prospective home buyers in need of mortgage financing to obtain loans. Pursuant to financing agreements with various banks and insurance companies, Meridian Mortgage would make the necessary arrangements for executing the mortgage loans, disbursing the mortgage loan proceeds, and servicing the mortgage indebtedness. Under the formal financing agreements with the banks and title companies, the clear legal implication was that Meridian Mortgage was actually borrowing funds from these institutions and then in turn was lending the funds to the home buyers. For example, as the court observed, the title to the home mortgage loans formally remained in the name of Meridian Mortgage until sold to a permanent investor. However, after observing the various formalities of the transactions, the court of appeals stated:

> The verbiage of these "loan" agreements does not accurately describe the actual transaction which occurs. They recite that the Bank "loans" the money to Meridian, but Meridian never receives any such loan. Meridian, in fact, is not even a conduit; the money goes directly from the Bank to the title company for disbursement to the Seller.[122]

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[118] *Id.* at 211 (quoting K. DAVIS, ADMINISTRATIVE LAW TEXT § 16.03 (3d ed. 1972)).

[119] 395 N.E.2d 433 (Ind. Ct. App. 1979).

[120] *Id.* at 441.

[121] *See* IND. CODE § 6-5.1-2-1 (Supp. 1980). The court of appeals in *Meridian Mortgage* was actually applying the predecessor statute, IND. CODE § 6-5-1-2 (1976) (repealed 1977). The court disclaimed any application of its opinion to the statute's new form because the repealed statute explicitly demanded ownership or control. 395 N.E.2d at 438 n.6.

[122] 395 N.E.2d at 435.

The court concluded after thorough analysis that, in light of the real substance of the transaction, Meridian Mortgage did not own or control the mortgage loans and consequently had no intangibles tax liability in respect thereto.[123] And in so holding the court stated: "It would be folly for us to hold that form triumphs over substance under these conditions. To fit these transactions into 'ownership' or 'control' on the part of Meridian would seem very much like trying to make a crab into a lobster without altering its shell."[124]

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[123]*Id.* at 440.

[124]*Id.* at 441.

XVII. Torts

JUDITH T. KIRTLAND*

A. Negligence

1. Duty.— In *Rossow v. Jones*,[1] the court of appeals affirmed a judgment entered for a tenant and against his landlord for personal injuries arising from the tenant's slip and fall in his apartment house. The accident occurred on a common stairway over which the landlord exercised control. At the time of the accident, the steps were covered with snow and ice.

For the purposes of this Survey, the most important issue considered by the court was the question of the landlord's duty to his tenants. Specifically, the court's opinion focused on the 1882 Indiana Supreme Court decision of *Purcell v. English*,[2] in which a tenant fell to the ground from a snow and ice covered common stairway when a rotten and loosened railing gave way. In that case, the supreme court affirmed a verdict directed against the tenant and stated that when a common stairway " 'is rendered unsafe by temporary causes, such as the accumulation of snow and ice, the landlord is not liable to the tenant who uses such stairway with full knowledge of its dangerous condition,' "[3] unless the landlord has contracted to repair the premises.

The *Rossow* court contrasted the *Purcell* decision with that of the court of appeals in *LaPlante v. LaZear*,[4] in which a tenant recovered for personal injuries caused by a latent defect in a step. *Purcell* was distinguished on the grounds that it concerned only a temporary covering of snow and because that opinion had specifically excluded a latent defect from the scope of its holding.[5] The *LaPlante* court, however, had specifically held that a landlord did have a duty to use reasonable care to maintain the common areas over which he maintained control.[6] The court reaffirmed the *LaPlante* holding as to the landlord's duty to maintain the common areas under his control and then proceeded to implicitly overrule the *Purcell* decision by

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[1]404 N.E.2d 12 (Ind. Ct. App. 1980).

[2]86 Ind. 34 (1882).

[3]404 N.E.2d at 13 (quoting 86 Ind. at 42).

[4]31 Ind. App. 433, 68 N.E. 312 (1903).

[5]404 N.E.2d at 13.

[6]*Id.*

holding that the scope of the landlord's duty extends to include hazards created by natural accumulations of snow and ice.[7]

The effect of *Rossow* is to adopt the so-called Connecticut rule,[8] which was discussed in the Rhode Island case of *Fuller v. Housing Authority.*[9] The *Fuller* court stated the rule as follows:

> As we adopt the Connecticut Rule, we wish to emphasize that a landlord is not a guarantor for the safety of his tenants as they proceed along the common ways. What we do say, however, is that an accumulation of ice or snow upon those portions of the premises reserved for the common use of his tenants may make the landlord liable for injuries sustained by his tenant which are due to such an accumulation, provided the landlord knows, or should have known, of the condition and failed to act within a reasonable time thereafter to protect against injuries caused thereby. The mere accumulation of snow or ice does not ipso facto make the landlord liable; he must be given a reasonable time after the storm has ceased to remove the accumulation of snow or ice found on the common ways or to take such measures as will make the common areas reasonably safe from the hazards arising from such a condition.[10]

As the *Fuller* court pointed out, the Connecticut rule does not make the landlord a guarantor with respect to injuries resulting from accumulations of snow and ice.[11] The law regarding the landlord's duty has simply been extended to its logical conclusion. The exception for accumulations of snow and ice has been eliminated and the landlord is now required to act in a reasonable manner to maintain all common areas from hazards generally. Just as has been the case with other hazards, the law relating to accumulations of snow and ice now permits recovery by the tenant if the landlord knew or should have known of the hazard and failed to remove the hazard despite a reasonable opportunity to do so.

Although the *Rossow* court's ultimate holding is consistent with

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[7]*Id.* at 14.

[8]The First District refused a similar opportunity to overrule *Purcell* and adopt the Connecticut rule in Orth v. Smedley, 378 N.E.2d 20 (Ind. Ct. App. 1978).

[9]108 R.I. 770, 279 A.2d 438 (1971).

[10]*Id.* at 774, 279 A.2d at 441.

[11]For example, in Orth v. Smedley, 378 N.E.2d 20 (Ind. Ct. App. 1978), the court observed that the adoption of the Connecticut rule would not render the landlord liable because the period of time between the cessation of the storm and the plaintiff's accident was too brief to permit a reasonable landlord to learn of the hazard and take corrective action. *Id.* at 23.

the present trend in this area of the law[12] and with the realities of apartment living,[13] the court's reliance upon the decision in *Hammond v. Allegretti*[14] is not so sound. *Hammond* concerned another area of law—the duty owed by a property owner to his business invitee. Although the *Rossow* and *Hammond* cases are somewhat similar in that both involve the duty owed by a property owner to others while on his premises, the characteristics of the "others" are quite different. The situation of a business invitee who ventures upon the premises in question, perhaps for the first time, can not be readily compared with that of a tenant who lives on the premises. Equally important are the very different legal theories and principles which have governed these two areas of the law.[15] Nonetheless, the court's decision in *Rossow* is simply the most recent manifestation of an increasing willingness on the part of courts to expand the duty owed by a property owner who profits from renting his land.[16]

In *Xaver v. Blazek*,[17] the Indiana Court of Appeals considered the issue of the duty of care owed by a property owner to one who is merely a social guest or licensee. This case was brought by a plaintiff who, while a social guest at the home of the defendants, stepped from a car into a drainage ditch located about nineteen inches from the edge of the cement driveway on which the car was parked. The trial court granted the defendants' motion for judgment on the evidence at the close of the plaintiffs' presentation of evidence on the theory that the plaintiffs had established no violation of the defendants' duty to a social guest.[18]

This decision was affirmed by the court of appeals in a decision which rejected the applicability in Indiana of section 342 of the Restatement (Second) of Torts.[19] Section 342 creates an additional

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[12]*See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (Essex County Ct. 1970); Inman v. Binghamton Hous. Auth., 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957). *See also* Donahue, *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242 (1974); Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19; Note, *Landlord-Tenant—The Fall of Landlord Tort Immunity*, 35 OHIO ST. L.J. 212 (1974).

[13]*See* Note, *The Uniform Residential Landlord and Tenant Act: Reconciling Landlord-Tenant Law with Modern Realities*, 6 IND. L. REV. 741 (1973).

[14]262 Ind. 82, 311 N.E.2d 821 (1974).

[15]*Compare* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 61 (4th ed. 1971), *with id.* § 63.

[16]*See* note 12 *supra*.

[17]391 N.E.2d 653 (Ind. Ct. App. 1979).

[18]*Id.* at 655.

[19]The RESTATEMENT (SECOND) OF TORTS § 342 (1965) provides:

Dangerous Conditions Known to Possessor

A possessor of land is subject to liability for physical harm caused to licensees

duty on the part of landowners who know or have reason to know of a dangerous condition on their property which creates an unreasonable risk to licensees.[20] That section's comments, however, include a statement that in the case of an adult licensee an obvious condition is not an appropriate basis for liability since the licensee, as well as the owner, is expected to be aware and careful of an obvious condition.[21] Therefore, it is unlikely that the adoption of this rule would have changed the result in *Xaver* because the record revealed that the ditch and driveway area was well-lighted and that any danger created by the ditch was obvious.[22]

2. Proximate Cause.—In *Peck v. Ford Motor Co.*,[23] the plaintiff sued for injuries sustained when a truck that he was driving collided with a truck manufactured by the defendant, Ford Motor Company. The United States District Court for the Southern District of Indiana entered judgment for the plaintiff. On appeal the defendant challenged the trial court's judgment on the issues of duty and proximate causation.[24] The evidence presented at trial established that the driver of the Ford truck had experienced problems with the gear shift before he drove onto the highway; that the truck had been abandoned on the highway at least three hours before the plaintiff's accident occurred; that the driver of the Ford truck had left the truck without posting proper warning devices or pulling the truck off the travelled portion of the highway; and finally, that the plaintiff had not seen the abandoned truck even though the weather conditions permitted a clear and unobstructed view of the highway ahead.[25]

The seventh circuit held that in this factual situation, in view of Indiana's "somewhat cautious approach" to extending liability to manufacturers under products liability concepts,[26] the Indiana courts

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by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

[20]Indiana's court of appeals in Wozniczka v. McKean, 144 Ind. App. 471, 247 N.E.2d 215 (1969), cited section 342 of the original Restatement of Torts with approval, but the facts of the case involved a *child* licensee only.

[21]RESTATEMENT (SECOND) OF TORTS § 342, Comment (b) (1965) provides: "If the licensees are adults, the fact that the condition is obvious is usually sufficient to apprise them, as fully as the possessor, of the full extent of the risk involved in it."

[22]391 N.E.2d at 656.

[23]603 F.2d 1240 (7th Cir. 1979).

[24]*Id.* at 1243.

[25]*Id.* at 1241-42.

[26]*Id.* at 1243.

would hold that the defendant's negligence, if any there was, in manufacturing a defective truck, was as a matter of law not the proximate cause of the plaintiff's injury.[27] The court finally concluded that the injuries suffered by the plaintiff Peck were too remote from any negligence by the defendant Ford in manufacturing its vehicle to be considered reasonably foreseeable.[28]

3. Negligence Per Se.—In *Brandes v. Burbank*,[29] the seventh circuit considered a challenge to the trial court's decision to give to the jury two instructions which seemed to be inconsistent. The first stated that the violation of a duty prescribed by a statute or ordinance is negligence per se[30] and the second referred to the possibility that the violation was with a reasonable excuse or justification.[31] After a lengthy analysis of Indiana's law regarding the doctrine of negligence per se, the court concluded that the trial court did not err in its instructions to the jury because both concepts were correct statements of Indiana law.[32]

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[27]*Id.* at 1245-46. The court noted that proximate causation is not the equivalent of actual causation. *Id.* at 1243. Proximate causation focuses on the extent of the defendant's duty to protect the plaintiff from the particular injuries which he sustained. The court further observed that legal standards of proximate causation are based, at least in part, on public policy considerations. *Id.*

[28]*Id.* at 1247. In its decision, the court refers to any negligence of the defendant as creating only a "condition" which made plaintiff's injuries possible. *Id.* at 1245. During the survey period, the court of appeals, in Mansfield v. Shippers Dispatch, Inc., 399 N.E.2d 423 (Ind. Ct. App. 1980), specifically disapproved a jury instruction in a negligence case which stated that a mere condition, with respect to which the interaction of others caused the accident at issue, was not the proximate cause of that accident. *Id.* at 425. The *Mansfield* court rejected this language as susceptible to the misinterpretation that passive negligence, as opposed to active negligence, cannot be a basis for liability. *Id.* This distinction, between passive and active negligence, is not recognized in Indiana law. *See* Fort Wayne Nat'l Bank v. Doctor, 149 Ind. App. 365, 272 N.E.2d 876 (1971), which expressly overruled any Indiana cases distinguishing between passive and active negligence.

[29]613 F.2d 658 (7th Cir. 1980).

[30]*Id.* at 660-61. Instruction number 12 included a lengthy statement of federal regulations regarding stopping along the interstate highway system and concluded with the following language: "If you find that the defendants violated the provisions of this regulation without reasonable excuse or justification, then such violation would constitute negligence as a matter of law on the part of the defendants." *Id.*

[31]*Id.* at 661. Instruction number 14 read as follows:

> Violation of a duty prescribed by statute or ordinance is generally considered negligence as a matter of law. Negligence as a matter of law, however, does not necessarily mean liability as a matter of law. A party may counter this evidence of negligence by showing justification for his noncompliance such as that his acts were the acts of a reasonably prudent man under the same circumstances, or by showing that his violation of the statute or ordinance was not a proximate cause of the injuries or damages sustained.

Id.

[32]*Id.* at 668.

Brandes concerned a lawsuit brought by a widow against the owner and driver of a tractor trailer with which the vehicle driven by her husband collided while the tractor trailer was parked along an emergency strip of the interstate highway. It appeared plainly from the record that this parking of the defendant's vehicle was a violation of federal regulation.[33]

The court acknowledged that there are Indiana authorities which would seem to indicate error in the trial court's decision to give both instructions in this case.[34] For example, the court quoted from *Northern Indiana Transit, Inc. v. Burk*:[35]

> "When the breach of a statutory duty is held to be negligence *per se*, or negligence as a matter of law, the court holds that the legislature has created an absolute duty, which cannot be escaped by attempting to prove that the breach was in fact done in the exercise of due care."[36]

The court stated that even though it would seem that the legislature has determined that a breach of statutory duty consitutes a failure to exercise due care and has created an absolute duty, this does not mean that there can be no excuse precluding liability.[37] The court narrowly read *Northern Transit* to mean only that the excuse cannot be that the violation of the statutory duty was done in

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[33]*Id.* at 660. The court also discussed at length the issues of whether a violation of a regulation should be regarded as the equivalent of a violation of a statute or ordinance and whether the violation of all statutes and ordinances should be considered negligence per se. *Id.* at 663. The court noted the position taken in the RESTATEMENT (SECOND) OF TORTS § 288B(1) (1965): "The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence itself." 613 F.2d at 663. The court concluded that there was no Indiana law on point and approved the trial court's adoption of section 288B(1) as the appropriate standard. *Id.* at 664-65.

Regarding the second issue, the court decided that the trial court had correctly evaluated the regulation as one the violation of which would be negligence per se, although violations of all regulations, statutes, and ordinances would not necessarily constitute negligence per se. *Id.* at 668. *See also* Ray v. Goldsmith, 400 N.E.2d 176 (Ind. Ct. App. 1980), in which the court discussed the standard in Indiana for determining whether the violation of a statute or ordinance is negligence per se:

> For such a violation of a statute or ordinance to be held as negligence *per se* it must be determined if the statute is applicable, that is, whether it was designed to protect the class of persons in which the plaintiff is included against the risk of the type of harm which has in fact occurred as a result of its violation.

Id. at 178 (citing W. PROSSER, *supra* note 15, § 36, at 200.

[34]613 F.2d at 661.

[35]228 Ind. 162, 89 N.E.2d 905 (1950).

[36]613 F.2d at 661 (quoting 228 Ind. at 171, 89 N.E.2d at 909).

[37]613 F.2d at 661.

the manner of a reasonably prudent person under those circumstances.[38] Citing *Larkins v. Kohlmeyer*,[39] decided by the Indiana Supreme Court after the *Northern Transit* case, the court noted that such a legal excuse or justification might be that it was impossible for the defendant to comply with the statute for reasons over which he had no control.[40]

After reviewing at length the cases in this area of the law decided subsequent to *Northern Transit* and *Larkins*,[41] the court concluded that the most accurate statement of the present Indiana law on this point is found in *Blankenship v. Huesman*:[42] a violation of a statutory duty is generally negligence as a matter of law but this does not mean liability as a matter of law. " 'A party may counter this evidence of negligence by showing justification for noncompliance, [such as that he acted like a reasonable and prudent man under the circumstances,] or by showing that his violation was not the direct cause of the injuries or damages sustained.' "[43] The court referred at several points throughout this opinion to the theories of Dean Foust,[44] one of which is that the proper analysis of this issue of negligence per se and excuse or legal justification is to say that as the statute at issue becomes more clearly a directive to deliberate or prepare for the safety of others, an excuse or justification for its violation becomes inherently more difficult to establish.[45] This method simply focuses on the "under the circumstances" aspect of the reasonable man test—the standard remains the same in the legal sense but can vary from case to case in the practical sense as the fact finder is called upon to analyze the dictates of and the policy reasons for various statutes.[46] In essence then, the seventh circuit concluded that proof of violation of a statute or ordinance

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[38]*Id.*

[39]229 Ind. 391, 98 N.E.2d 896 (1951).

[40]613 F.2d at 661.

[41]*See, e.g.*, Thornton v. Pender, 377 N.E.2d 613 (Ind. 1978); Davison v. Williams, 251 Ind. 448, 242 N.E.2d 101 (1968).

[42]362 N.E.2d 850 (Ind. Ct. App. 1977).

[43]613 F.2d at 667 (quoting 362 N.E.2d at 852). Although the *Brandes* opinion uses language similar to this in several places, it surely does not represent an effort on the part of the court to shift the burden of proof on the issue of proximate causation to the defendant in a negligence per se case. More likely, the language is simply used as an example of the error in the theory that negligence per se is liability per se and is not intended to make any particular statement as to the party with the burden of establishing this issue.

[44]*See* Foust, *The Use of Criminal Law as a Standard of Civil Responsibility in Indiana*, 35 IND. L.J. 45 (1959). Foust's article reflects his anticipation of the recent developments in this area of the law.

[45]613 F.2d at 667 (citing 35 IND. L.J. at 58-59).

[46]613 F.2d at 667 (citing 35 IND. L.J. at 58-59).

which constitutes negligence per se, only establishes a rebuttable presumption of liability. That presumption may be rebutted by proof which, under the circumstances of the particular case, is deemed adequate to provide an excuse or justification.

4. Incurred Risk.—In *Gerrish v. Brewer*,[47] the court of appeals reviewed an appellant's challenge to the trial court's refusal to include a reference to the doctrine of momentary forgetfulness[48] in its incurred risk instruction.[49] The appellant complained that the incurred risk instruction given by the court incorrectly permitted the jury to consider constructive knowledge as a bar to the plaintiff's recovery pursuant to the incurred risk defense.[50]

Quoting at some length from the decision in *Kroger Co. v. Haun*,[51] the *Gerrish* court distinguished between the doctrine of incurred risk and the doctrine of contributory negligence. In essence, incurred risk refers to a subjective mental state of awareness and venturesomeness without regard to the reasonableness of the risk acceptance, while contributory negligence involves carelessness and an objective inquiry into the reasonableness of particular actions.[52] In this light, the court concluded that the doctrine of momentary forgetfulness could only relate to the affirmative defense of contributory negligence, not to incurred risk: "[S]ince the very essence of incurred risk is the conscious, deliberate and intentional embarkation upon a course of conduct with knowledge of the circumstances, the doctrine of 'momentary forgetfulness' cannot become a part of the doctrine of incurred risk."[53] Therefore, the court held that the

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[47]398 N.E.2d 1298 (Ind. Ct. App. 1979).

[48]The doctrine of momentary forgetfulness was discussed in Town of Argos v. Harley, 114 Ind. App. 290, 49 N.E.2d 552 (1943), as follows:

> Where a pedestrian is injured as a consequence of a defect of which he had previous knowledge, the mere fact of previous knowledge does not per se establish contributory negligence. And this is also the rule where previous knowledge is coupled with absence of thought concerning the defect at the time of the injury, or momentary forgetfulness of it. Previous knowledge of a defect and forgetfulness of it are important facts to be considered in connection with all other circumstances in determining whether the party injured was exercising reasonable care. But it is not negligence, as a matter of law, for a person who has knowledge of a defect not to remember it at all times and under all circumstances.

Id. at 305, 49 N.E.2d at 557-58.

[49]398 N.E.2d at 1300.

[50]*Id.*

[51]379 N.E.2d 1004 (Ind. Ct. App. 1978).

[52]398 N.E.2d at 1300-01. *See* Fruehauf Trailer Div. v. Thornton, 366 N.E.2d 21 (Ind. Ct. App. 1977); Pittsburgh, C., C. & St. L. Ry. v. Hoffman, 57 Ind. App. 431, 107 N.E. 315 (1914).

[53]398 N.E.2d at 1301.

trial court committed no error in its refusal to incorporate the concept of momentary forgetfulness into its incurred risk instruction.[54]

B. Defamation[55]

In *Lee v. Weston*,[56] the court of appeals reviewed a decision of the Madison County Superior Court granting summary judgment for the defendant coroner. The plaintiffs alleged that the defendant had defamed both them and the memory of their deceased son by rendering a coroner's verdict that the son's death was caused by "Aspiration of body content/Due to overdose."[57] Plaintiffs argued on appeal that their son's status as a financial dependent and a member of their household caused persons who knew them and their son to consider the verdict regarding his cause of death as a direct reflection on them.[58]

The court recognized this as a question of first impression in this jurisdiction and adopted the rule set forth by Professor Prosser: " '[N]o civil action will lie for the defamation of one who is dead, unless there is a reflection upon those still living, who are themselves defamed.' "[59] In other words, defamation of a deceased person does not give rise to a right of action on behalf of his estate, nor does the defamation of the memory of a deceased person give his relatives a cause of action for libel in their own right, unless the defamation directly reflects upon those relatives.[60]

Correctly describing this rule as that applied in the overwhelming majority of jurisdictions, the court referred to a number of dif-

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[54]*Id.*

[55]*See also* the discussion regarding the decision in Merimee v. Brumfield, 397 N.E.2d 315 (Ind. Ct. App. 1979), *infra* page 562, which case determined the survivability of claims for malicious prosecution, false imprisonment, and defamation.

[56]402 N.E.2d 23 (Ind. Ct. App. 1980).

[57]*Id.* at 24.

[58]*Id.* at 26.

[59]*Id.* (quoting W. PROSSER, *supra* note 15, § 111, at 745).

[60]*See* 50 AM. JUR. 2d *Libel & Slander* § 320 (1970), which provides:

> Although a right of action for damages for defamation of a deceased person existed under the Roman law, and still exists in some jurisdictions which adhere to the civil law, it is established that defamation of a deceased person does not give rise to a right of action at common law in favor of the surviving spouse, family, or relatives who are not defamed. And this is the rule notwithstanding the fact that the commonly accepted definition of libel includes, as one form thereof, publications tending to blacken the memory of the dead. Moreover, a libel and slander upon the memory of a deceased person which does not directly reflect upon the deceased's relatives, or upon his former associates, gives them no cause of action for libel, in their own right, upon the ground that the defamation tended to subject them to ridicule or contempt.

ferent rationales for the rule: That a rule approving a right of action for survivors would be inconsistent with our culture's theories of success on one's own merits without regard to the character of his relatives;[61] that there is no adequate way to determine the degree of consanguinity which should be used to distinguish those relatives entitled to a cause of action from those relatives who are not entitled to one;[62] that any right of action created for a relative of a deceased person would then logically exist for such relative before the death of the decedent;[63] that any rule creating such a right of action would interfere with historical research;[64] and finally, that one cannot legitimately sue for the defamation of another.[65]

C. Fraudulent Misrepresentation

In *Fleetwood Corp. v. Mirich*,[66] plaintiff Mirich and others sought to recover damages from Fleetwood Corporation and Reginald Brown, a corporate director and its administrator, on the theory that Brown's misrepresentations as to several aspects of a stock transaction induced them to sell their stock in the corporation at a price substantially below its fair market value. Of particular interest in this case was the plaintiffs' allegation that Brown falsely represented that all shareholders were required to sell their shares at the price of five hundred dollars ($500.00) per share.[67]

In fact, during the month of November, 1971, Fleetwood's annual shareholders' meeting adopted the following resolution: "RESOLVED, That the officers of the corporation are granted authority to sell the net fixed assets of the Fleetwood Corporation for a price that will yield to the shareholder an amount not less than $500.00 per share."[68] Several months later, Brown met individually with each of the plaintiffs and represented to them that pursuant to the terms of this resolution, they were required to sell their shares at that price.

On appeal from the trial court's judgment for the plaintiffs, the defendants argued that Brown's statement was merely an expression of his personal opinion as to the effect of the November resolution and that the plaintiffs were not, therefore, entitled to rely upon

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[61]402 N.E.2d at 27 (quoting Note, *Libel—Defamation of Dead Person—Injury to Reputations of Surviving Relatives*, 40 COLUM. L. REV. 1267, 1268-69 (1940)). *See* Skrocki v. Stahl, 14 Cal. App. 1, 110 P. 957 (1910).

[62]402 N.E.2d at 27 (quoting 40 COLUM. L. REV. at 1268-69). *See* Kelley v. Post Publishing Co., 327 Mass. 275, 98 N.E.2d 286 (1951).

[63]402 N.E.2d at 27 (quoting 40 COLUM. L. REV. at 1268-69).

[64]*Id.*

[65]*Id.*

[66]404 N.E.2d 38 (Ind. Ct. App. 1980).

[67]*Id.* at 41.

[68]*Id.*

this statement. Citing two cases, *Rochester Bridge Co. v. McNeill*[69] and *Vernon Fire & Casualty Insurance Co. v. Thatcher*,[70] the appellate court observed that "the mere fact that a statement takes the form of an expression of opinion is not always conclusive."[71] After a review of the evidence on this point, including Brown's admittedly intentional effort to give the impression that the shareholders were required to sell, the court determined that the jury was justified in considering Brown's representation regarding the November resolution as a statement of existing fact.[72]

In its decision, the court plainly adopted the majority view[73] that the form of the statement is not the controlling issue.[74] The central inquiry is whether it is reasonable or probable that the listener will accept the statement as one of fact and then act upon it. If so, the statement, even if in the form of an opinion, is probably actionable.[75] Thus, the analysis of the nature of the representation, a statement of fact or an expression of opinion, is closely tied to the analysis of the reasonableness of the plaintiff's reliance on that statement.

Also in step with the modern trend in misrepresentation cases was the court's failure to consider the traditional rule that a statement of law, regardless of the form that the statement may take, is merely an assertion of opinion and, therefore, that such a statement of law is insufficient as a basis for an action in fraud or deceit.[76] Originally premised on two inconsistent theories, the first that every man is presumed to know the law and therefore that one cannot assert that he reasonably believed a misrepresentation as to the law,[77] and the second that no layman can be relied upon to know the law and therefore that no reliance on a legal misrepresentation can be reasonable,[78] this rule is rapidly fading from the legal scene as more and more courts recognize the reality that a layman may indeed reasonably rely upon a misrepresentation in the form of a statement of law.

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[69]188 Ind. 432, 122 N.E. 662 (1919).

[70]152 Ind. App. 692, 285 N.E.2d 660 (1972).

[71]404 N.E.2d at 43.

[72]*Id.* at 44.

[73]*See* W. PROSSER, *supra* note 15, § 109, at 720-31, and his discussion of statements in the form of an opinion.

[74]404 N.E.2d at 43-44.

[75]*See* PROSSER, *supra* note 15, § 109, at 721.

[76]*See* PROSSER, *supra* note 15, § 109, at 724-25, for a discussion of the growing trend away from the distinction between misrepresentations of fact and of law.

[77]*See* Burt v. Bowles, 69 Ind. 1 (1879). Of course, this principle is actually a perversion of the rule that ignorance of the law cannot be an adequate excuse or defense. In fact, what attorney knows all the law?

[78]*See* Fish v. Cleland, 33 Ill. 237 (1864); Thompson v. Phoenix Ins. Co., 75 Me. 55 (1883).

D. Malicious Prosecution

1. Elements of the Cause of Action.—In *Peoples Bank & Trust Co. v. Stock*,[79] perhaps the most important decision in the torts area during the Survey period, both the court of appeals and the supreme court[80] considered a malicious prosecution case which has greatly expanded the scope of this cause of action. Although rather detailed, the following factual summary is necessary to fully understand the significance of this case. Michael Canada, the divorced father of two minor children, died in November of 1974 and left as his principal asset a Metropolitan Life Insurance Company policy of life insurance on which one "Sonja K. Canada, Wife" was designated as beneficiary. Prior to July of 1974, the beneficiary had been designated as "Sonja K. Stock, Fiancee." In fact, at the time of his death, Canada had lived with, but never married Sonja K. Stock.[81] After Canada's death, an attorney named Arthur E. Ecklund, who had represented Canada's former wife in earlier dissolution proceedings and who later represented her in contempt proceedings against Canada, requested that Peoples Bank & Trust Company serve as personal representative of Canada's estate. Peoples agreed to do so, apparently with the understanding that its only responsibility would be to attempt to recover the proceeds of the Metropolitan Life policy for the estate.[82] With Ecklund acting as counsel for the personal representative, Peoples filed suit against Metropolitan Life and Sonja Stock. In its complaint, Peoples sought a restraining order to prevent Metropolitan Life from paying the proceeds of the insurance policy to "an imposter alleging to be Sonja K. Canada—Wife" and further alleging that Sonja K. Stock "is wrongfully alleging and holding herself out to be one Sonja K. Canada, when in fact she is not."[83] After a hearing on the merits, the Marion Circuit Court concluded that Sonja K. Stock a/k/a Canada was in fact the beneficiary designated on Canada's life insurance policy.[84]

Shortly thereafter, Sonja K. Stock brought suit against Peoples for malicious prosecution. A Hancock Circuit Court jury rendered a

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[79]392 N.E.2d 505 (Ind. Ct. App. 1979).

[80]The supreme court denied the defendant Bank's petition for transfer. 403 N.E.2d 1077 (Ind. 1980).

[81]The evidence at trial revealed that although Sonja K. Stock had never actually married Canada, she had on several occasions used the name "Sonja K. Canada." Therefore, there was no "Sonja K. Canada, Wife," but there was a woman who had, at least on occasion, called herself "Sonja K. Canada."

[82]392 N.E.2d at 510.

[83]*Id.* at 507.

[84]*Id.*

verdict in favor of Stock and awarded her damages in the amount of $75,000.00.

On appeal, Peoples raised more than a dozen contentions of error, but the most significant for the purposes of this Survey are those relating to the essential elements of the cause of action of malicious prosecution. In particular, the court of appeals' opinion[85] addressed the requirements for establishing the elements of malicious prosecution: a prosecution against the plaintiff, a lack of probable cause, and malice in bringing the underlying action.[86]

a. Prosecution.—The threshold issue in any malicious prosecution action must be whether the underlying legal action constituted a "prosecution" against the plaintiff for purposes of the malicious prosecution action.[87] The appellant bank argued on appeal that its action against Metropolitan Life and Stock was in the nature of a declaratory judgment action, in the sense that it actually sought only a declaration of the rights of the parties to the insurance proceeds[88] and that Stock was added as a defendant only so that all persons with a potential interest in the policy proceeds would be joined in the lawsuit.[89]

The court of appeals quoted at some length from *Treloar v. Harris*,[90] an early Indiana malicious prosecution case concerning the issue of the meaning of the word "prosecution," and concluded that the word "prosecution" simply referred to any sort of legal process or judicial proceeding to which a person may have been subjected.[91] Such a broad definition of the prosecution element is in fact consistent with the language of the *Treloar* decision but reflects a substantial variance from the type of case which has actually been at issue in Indiana's malicious prosecution cases. The *only* civil cases which have supplied the basis for a malicious prosecution action in this State have been cases in which a tort was charged, the facts of

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[85] *Id.*

[86] *Id.* at 507-08.

[87] The court of appeals decision did not approach this case in this way, but began with a discussion of the issue of a lack of probable cause. The dissenting opinion of Justice Pivarnik, of the supreme court, however, begins at the logical point of analysis, with the prosecution issue. 403 N.E.2d 1077, 1082.

[88] 392 N.E.2d at 511. The complaint filed by the defendant Bank sought an injunction against Metropolitan Life to prevent the payment of the insurance proceeds prior to a hearing, a judgment against Metropolitan Life for the amount of the proceeds, and a judgment against Sonja K. Stock denying her any right to the proceeds. After the complaint was filed, Metropolitan Life paid the proceeds into the Clerk's office in interpleader. *See* IND. R. TR. P. 22. Therefore, the court's final judgment ordered the Clerk to pay the proceeds to Stock.

[89] 392 N.E.2d at 511.

[90] 66 Ind. App. 59, 117 N.E. 975 (1917).

[91] 392 N.E.2d at 511.

which would also constitute a crime[92] or in which the malicious prosecution plaintiff had been subject to being taken into custody.[93]

In response to the arguments that the plaintiff, Stock, was not subjected to a prosecution because a monetary judgment or an injunctive decree could not have been entered against her in the underlying case and that she was only a necessary party to a determination of the proper distribution of insurance proceeds, the court stated that the Bank could have presented this matter as a pure question of law. However, the Bank chose instead to include in its complaint, allegations of Stock's holding herself out as the wife of Canada when in fact she was not and the specific allegations that she was an imposter and was acting wrongfully in seeking the insurance proceeds.[94] These specific allegations rendered the underlying lawsuit more than a mere question of law with respect to which only a declaration of rights would have been appropriate. The court, in essence, determined that when the Bank made the decision to include these personal allegations with respect to Stock and thereby imposed upon her "the obligation not simply to litigate the legal question of the validity of the beneficiary designation but also to defend against allegations that she was an imposter and that she was wrongfully holding herself out to be Sonja K. Canada,"[95] the Bank somehow converted this into a prosecution against Stock.

This analysis of the issue of prosecution by focusing on the nature of the allegations contained in the lawsuit rather then the essential nature of the cause of action itself would seem totally inconsistent with the concept of malicious prosecution itself; malicious prosecution must be premised upon the filing of an action, not the mere making of certain allegations, whether necessary to the action or not. In fact, the court's emphasis upon the specific allegations contained in the Bank's complaint created an apparent exception to the concept of privilege in legal pleadings which has heretofore prohibited successful legal action on the basis of libelous allegations included in such pleadings.[96]

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[92]*See, e.g,* Strickler v. Greer, 95 Ind. 596 (1884); Stancliff v. Palmeter, 18 Ind. 321 (1862).

[93]*See, e.g.,* Coffey v. Myers, 84 Ind. 105 (1882); Treloar v. Harris, 66 Ind. App. 59, 117 N.E. 975 (1917).

[94]392 N.E.2d at 511.

[95]*Id.*

[96]*See* Meier v. Combs, 156 Ind. App. 458, 297 N.E.2d 436 (1973); Stahl v. Kincade, 135 Ind. App. 699, 192 N.E.2d 493 (1963). As these cases held, an allegation in a legal pleading is absolutely privileged as long as the allegation is pertinent and relevant to the subject matter of the lawsuit. In *Peoples*, there can be little question that allegations relating directly to the status of another party claiming the insurance proceeds and the theory upon which such claim was presented were pertinent and relevant to

b. Probable cause and malice.—The court's analysis of the issues of lack of probable cause and malice have also served to expand the potential availability of the malicious prosecution action. With respect to the probable cause issue, the court again relied upon a definition found in the *Treloar* decision[97]—the court in *Treloar* approved a jury instruction which explained that if the defendant, in the malicious prosecution case, brought the underlying action against the plaintiff "without making the inquiry that a prudent, cautious person would make under like circumstances, then and in that case, as a matter of law, the bringing of the action, or, in other words the prosecution was instituted without probable cause."[98] As the *Peoples* court pointed out, the evidence presented at trial revealed that the Bank had made no independent investigation of the facts and had relied upon the factual and legal analysis of attorney Ecklund.[99] However, to the extent that the concept of probable cause requires a *factual* investigation by a potential plaintiff, the Bank could not be faulted for its failure to investigate. At trial there was no real dispute as to the facts involved. The dispute was a legal question involving the propriety of the designation of a beneficiary in light of the fact, as all parties apparently agreed, that Michael Canada and Sonja K. Stock had never been married.[100]

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the matter at issue in the Bank's suit—the issue of the proper distribution of the insurance proceeds. The court's opinion made no reference to the allegations against Stock as irrelevant or spurious. Quite the contrary, the court recognized the legal effectiveness of the allegations when it spoke of the obligation thereby imposed upon Stock to litigate the issues so raised. In essence, then, the court in *Peoples* has approved a cause of action premised upon particular allegations relevant to the lawsuit at issue.

[97]392 N.E.2d at 508 (quoting 66 Ind. App. at 72, 117 N.E. at 979).

[98]*Id.* (emphasis omitted).

[99]392 N.E.2d at 510.

[100]As the dissenting opinion of Justice Pivarnik noted, the Bank had very little chance of prevailing in the underlying litigation on the legal question of the sufficiency of the designation of beneficiary. 403 N.E.2d at 1087. This was obviously of considerable significance to the jury in the trial court and to the court of appeals in determining whether there was probable cause to bring the underlying litigation. *See* Indianapolis Traction & Terminal Co. v. Henby, 178 Ind. 239, 97 N.E. 313 (1912):

> In the abstract, probable cause is a pure question of law, but its existence in a given case is a mixed question of law and fact, when one or more of the elementary facts thereof relied upon is controverted. In such case the court must hypothetically state to the jury the material facts which the evidence tends to prove, and positively direct, as to the law, upon the assumed state of facts. Where the facts are uncontroverted, the court must determine the existence or nonexistence of probable cause.

Id. at 248, 97 N.E. at 317.

What burden does this place upon potential plaintiffs and their attorneys who recognize that the law is against them but also see a need for change in that law? *See* 1980 IND. CT. R. 341, *Indiana Code of Professional Responsibility*, Disciplinary Rule 2-109, which provides in pertinent part:

Nonetheless, the court concluded that the Bank's lack of investigation, presumably of the factual *and* legal basis of the suit,[101] and its reliance upon an attorney[102] who also represented a person with a

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(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:

. . .

(2) Present a claim or defense in litigation that is not warranted under existing law, *unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.*

Id. (emphasis added).

[101]Peoples filed a third party complaint against Attorney Ecklund and alleged in particular:

4. Any recovery of a judgment by the plaintiff against the defendant-third party plaintiff for malicious prosecution as alleged in the amended complaint, would have been caused by the actions of the third party defendant who rendered professional legal advice to and upon which the defendant-third party plaintiff relied.

392 N.E.2d at 514. The court concluded that the effect of this allegation was a charge of professional malpractice which would only create confusion and delay. *Id.* Therefore, the trial court granted Stock's motion to strike the third party complaint against Ecklund. This decision was upheld as within the trial court's sound discretion. *Id. See* City of Elkhart v. Middleton, 265 Ind. 514, 356 N.E.2d 207 (1976), for a discussion of the extent of the trial court's discretion in this regard.

[102]The Bank apparently relied upon Ecklund's legal advice as well as his factual presentation of the evidence in this matter. The Bank presented the defense of reliance on the advice of counsel at trial. The appellate court recognized the effect of this doctrine as a complete defense when applicable and quoted from Indianapolis Traction & Terminal Co. v. Henby, 178 Ind. 239, 97 N.E. 313 (1912):

Where, before the commencement of the prosecution, the prosecutor honestly and in good faith sought advice of reputable counsel, and made to such counsel a full and true statement of all the material facts within his knowledge, and such counsel thereupon advised the prosecutor that the facts so stated warranted the prosecution, and, relying on the advice, the prosecutor in good faith commenced the action, such facts constitute probable cause, and consequently a complete defense against an action for malicious prosecution, although the advice given was erroneous.

Id. at 248-49, 97 N.E. at 317. *See also* Satz v. Koplow, 397 N.E.2d 1082 (Ind. Ct. App. 1979), in which the court emphasizes the need for a full and accurate disclosure of the facts to the attorney.

In this case, however, the court rejected the applicability of the defense for the reason that the attorney upon whom the defendant relied was not impartial, disinterested, and free from bias or prejudice. 392 N.E.2d at 510. *See* 52 AM. JUR. 2d *Malicious Prosecution* § 80 (1970). Because Ecklund presented the factual situation and his determination that the Canada children deserved the insurance proceeds, as opposed to the Bank, the Bank apparently should not have retained him as counsel in its efforts to collect the insurance proceeds. But is this not frequently what happens in probate matters—the attorney who represents the decedent's widow and children approaches a bank and asks that it serve as personal representative of the decedent's estate and the bank in turn retains the attorney as its counsel in any legal proceedings which are necessary? In fact, the record revealed that Peoples and Ecklund had had this type of relationship in other probate matters on previous occasions.

Finally, one must ask what burden this case puts on a client to inquire, and

stake in the outcome, was sufficient to support the jury's decision that the Bank brought the litigation without probable cause.[103]

What the court apparently perceived as a small step in logic, from finding a lack of probable cause to finding an evidentiary basis for malice, is, however, a giant leap. Relying on certain language in the case of *Pontius v. Kimble*,[104] the court held in essence that malice may be inferred from a lack of probable cause.[105] Therefore, having upheld the jury's finding of a lack of probable cause because the Bank failed to conduct its own investigation and relied on the legal advice of an attorney who also represented a person with a stake in the outcome of the litigation over the insurance proceeds, the court then determined that that finding alone was sufficient to support a finding of malice. This is not, and has never been, a proper statement of the law on this point. There are many cases which specifically speak to the need for evidence of malice in addition to evidence merely establishing a lack of probable cause.[106] Even the *Pontius* decision cannot be said to stand for the proposition relied upon by the court. The wording of the *Pontius* opinion makes it plain that only in certain limited circumstances, perhaps in which no other explanation of the decision to bring the lawsuit is apparent, can malice be inferred directly and solely from a lack of probable cause. The court in *Pontius* emphasized, however, that a lack of probable cause and malice are two separate elements and that both must be satisfied before a plaintiff may recover.[107]

The factual situation in this case serves to underscore the expansion of the cause of action of malicious prosecution which has been accomplished by the court's holdings in this case. The underlying litigation was, as the Bank pointed out, only an effort to obtain a determination of the proper beneficiary of certain insurance pro-

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perhaps even investigate his attorney's background and possible interest in the outcome of litigation. The court denied the use of the reliance on the advice of counsel defense to the Bank because it determined that the Bank's attorney was not impartial and disinterested. Is this really the standard or is it only necessary that a potential plaintiff consult an attorney whom he believes to be impartial, disinterested, and free from bias or prejudice?

[103]392 N.E.2d at 510.

[104]56 Ind. App. 144, 104 N.E. 981 (1914).

[105]392 N.E.2d at 510.

[106]*See* Strickler v. Greer, 95 Ind. 596 (1884); Carey v. Sheets, 67 Ind. 375 (1879); Newell v. Downs, 8 Blackf. 523 (1847).

[107]56 Ind. App. at 146, 104 N.E. at 982. Read in its entirety, *Pontius* said that in some cases malice may be inferred from a lack of probable cause, but that such an inference does not necessarily follow from a finding of a lack of probable cause. Of course, this is accurate—in some cases the same facts which establsih a lack of probable cause are sufficient to establish malice as well, but in others, such as *Peoples*, the finding of a lack of probable cause is premised at most on evidence of the Bank's negligence and can never be considered adequate to support an inference of malice.

ceeds. Although the Bank was aware of the factual situation when it agreed to serve as personal representative of the Canada estate, once it had accepted that position it certainly had some fiduciary obligation to gather all assets which arguably belonged in the estate. The Bank relied upon the advice of its counsel, and in this particular case that counsel also had a relationship with another person involved in this case. The Bank, however, had dealt with the attorney in other cases and had no reason to doubt his representations as to the facts and the law in this matter. What can at most be described as negligence on the Bank's part was then construed to be malice; yet, no evidence of any such attitude toward the plaintiff existed.

2. Survival of a Claim.—In *Merimee v. Brumfield*,[108] the Indiana Court of Appeals considered an issue of first impression in Indiana—whether actions for malicious prosecution and false imprisonment survive a victim who dies as a result of unrelated causes. Indiana's survivial statute provides as follows: "All causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to such action, by or against the representative of the deceased party, except actions for personal injuries to the deceased party, which shall survive only to the extent provided herein."[109] The statute later provides that personal injury actions shall survive in only a limited way—the personal representative may recover only "the reasonable medical, hospital and nursing expense and loss of income of said injured person, resulting from such injury, from the date of the injury to the date of his death."[110]

The arguments asserted by the parties on appeal presented the court with a narrowly defined issue: does the language of the survival statute, which speaks of "personal injuries," refer to *any* injury which affects the individual, including libel, slander, malicious prosecution, false imprisonment, and invasion of privacy, or does it apply to bodily injuries only?

The court, after a discussion of the development of the particular language used in Indiana's survival statute,[111] concluded that the term "personal injuries" as used in that statute includes within its meaning not only injuries to the physical body but also "malicious prosecution, false imprisonment, libel, slander, or any affront or detriment to the body, psyche, reputation or liberty, as con-

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[108]397 N.E.2d 315 (Ind. Ct. App. 1979).

[109]IND. CODE § 34-1-1-1 (1976).

[110]*Id.*

[111]397 N.E.2d at 317-18. The court focused, in particular, on the legislature's choice of the term "injuries to the person" or "personal injuries," rather than "bodily injuries." *Id.* at 318.

tradistinguished from injury to property rights."[112] Therefore, an action for malicious prosecution and false imprisonment survives a victim who dies as a result of unrelated causes only in the limited sense mentioned above.

E. Medical Malpractice

In *Revord v. Russell*,[113] the plaintiffs, parents of a ten-year old child whose heart stopped during brain surgery and who remained comatose at the time of trial some four years later, brought suit against the physician who performed the surgery. The plaintiffs premised their action on the doctrine of informed consent[114] and asserted as the essence of their claim the doctor's failure to apprise them of the dangers of heart stoppage and permanent coma. Although the success of their claim depended upon proof of the wording of the defendant's pre-consent disclosure, at trial the plaintiffs presented no medical evidence relating to the contents of a reasonable disclosure under the circumstances.[115] In ruling against the plaintiffs and in affirming the trial court's judgment, the court adopted the general rule that medical testimony is required to establish the content of a reasonable disclosure, unless the circumstances are so clearly within the realm of a layman's understanding that even he could recognize the necessity of such a disclosure.[116]

In *Stevens v. Kimmel*,[117] the court of appeals considered a case brought by an employee against his employer's company physician for negligent treatment of a work-related injury. The trial court had dismissed the plaintiff's claim on the theory that workmen's compensation provided the exclusive remedy for the plaintiff.[118]

On appeal, the court noted that the Workmen's Compensation

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[112]*Id.* at 318.

[113]401 N.E.2d 763 (Ind. Ct. App. 1980).

[114]*Id.* at 764. The doctrine of informed consent recognizes a physician's duty to disclose to his patient, or in the case of a minor, to the patient's parent or guardian, before any consent is given or consent form signed, a full and accurate disclosure of the risks of the proposed course of treatment and any possible alternatives to the treatment. For a discussion of the doctrine and its application in Indiana, see Karlson & Erwin, *Medical Malpractice: Informed Consent to the Locality Rule*, 12 IND. L. REV. 653 (1979).

[115]410 N.E.2d at 767.

[116]*Id.* at 766-67 (citing Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972)). This rule raises some problems in logic. If the content of the disclosure reasonable under the circumstances is so clear that a jury requires no medical testimony, why does the lay patient require any disclosure at all? It seems that he should also be expected to understand the risks involved without a physician's explanation.

[117]394 N.E.2d 232 (Ind. Ct. App. 1979).

[118]*Id.* at 233.

Act[119] provides an exclusive remedy[120] for the employee in the event of a work-related injury and that that remedy encompasses circumstances in which the employee is injured by the actions of a co-employee.[121] The critical issue then focused on the status of the company-employed physician and a determination whether he was a co-employee or an independent contractor.

The court quoted at some length from and expressly approved the holding of the fourth district in a similar factual situation.[122] In *Ross v. Schubert*,[123] the company's doctor was found to be an independent contractor within the meaning of the Workmen's Compensation Act.[124] Therefore, an action for medical malpractice will lie when brought by an employee against a physician employed by the same employer.

F. Retaliatory Discharge

In *Scott v. Union Tank Co.*,[125] the plaintiff brought suit against his former employer on the ground that he had been wrongfully discharged in retaliation for filing a workmen's compensation claim. Because the plaintiff had waited for a period of more than two years before filing his lawsuit, the critical issue was whether the appropriate statute of limitations was for an action in tort or in contract.[126] Dispite a vigorous dissent by Judge Staton,[127] the court of appeals concluded that such an action sounds in tort, not contract, and is therefore limited by a two-year statute of limitations.[128]

In fact, this decision's significance is minimized by a new statute which took effect after the case arose. Indiana Code section 34-1-2-1.5[129] now limits to two years the life of any cause of action

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[119]*See* IND. CODE §§ 22-3-2-1 to -21 (1976 & Supp. 1980).

[120]*See id.* § 22-3-2-6 (1976) which states in part:

> The rights and remedies herein granted to an employee subject to this act on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death.

[121]394 N.E.2d at 233 (citing O'Dell v. State Farm Auto Ins. Co., 362 N.E.2d 862 (Ind. Ct. App. 1977); Burkhardt v. Wells, 139 Ind. App. 658, 215 N.E.2d 879 (1966)).

[122]394 N.E.2d at 233-34 (citing Ross v. Schubert, 388 N.E.2d 623 (Ind. Ct. App. 1979)).

[123]388 N.E.2d 623 (Ind. Ct. App. 1979).

[124]IND. CODE § 23-3-2-1 to -21 (1976 & Supp. 1980).

[125]402 N.E.2d 992 (Ind. Ct. App. 1980).

[126]*Id.* at 993.

[127]*Id.* at 993-97 (Staton, J., dissenting).

[128]*Id.* at 993.

[129]*See* IND. CODE § 34-1-2-1.5 (Supp. 1980) which states in part:

> All actions relating to the terms, conditions, and privileges of employment except actions based upon a written contract (including, but not limited to,

arising from an unwritten employment contract. However, the case is of considerable significance when compared to the several Indiana cases, referred to in the dissenting opinion by Judge Staton.[130] These cases reflect the traditional Indiana rule that a court shall, whenever feasible, adopt the theoretical construction which permits the plaintiff's cause of action to survive the statute of limitations.[131]

G. Wrongful Death

Two cases decided during the survey period, *Lustick v. Hall*[132] and *Thomas v. Eads*,[133] concerned the proper meaning to be attributed to certain words in Indiana's Wrongful Death Act[134]—particularly, the words "dependent" and "surviving." *Lustick* arose from an auto accident resulting in the death of a noncustodial parent with no court-ordered support obligation to her minor children. Although the dissolution decree made no mention of any custodial or support obligation of the decedent, the evidence at trial revealed that she

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hiring or the failure to hire, suspension, discharge, discipline, promotion, demotion, retirement, wages, or salary) shall be brought within two (2) years of the date of the act or omission complained of.

[130]402 N.E.2d at 993-94 (Staton, J., dissenting) (citing Holt Ice & Cold-Storage Co. v. Arthur Jordan Co., 25 Ind. App. 314, 57 N.E. 575 (1900); Raugh v. Stevens, 21 Ind. App. 650, 52 N.E. 997 (1899)).

[131]*See* 1 I.L.E. *Actions* § 25, at 95 (1957).

[132]403 N.E.2d 1128 (Ind. Ct. App. 1980).

[133]400 N.E.2d 778 (Ind. Ct. App. 1980).

[134]IND. CODE § 34-1-1-2 (1976). This statute provides in pertinent part:

That part of the damages which is recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent's estate for the payment thereof. The remainder of the damages, if any, shall, . . . inure to the exclusive benefit of the widow or widower, as the case may be, and to the dependent children, if any, or dependent next of kin, to be distributed in the same manner as the personal property of the deceased. If such decedent depart this life leaving no such widow or widower, or dependent children or dependent next of kin, surviving her or him, the damages inure to the exclusive benefit of the person or persons furnishing necessary and reasonable hospitalization or hospital services in connection with the last illness or injury of the decedent, performing necessary and reasonable medical or surgical services in connection with the last illness or injury of the decedent, to the undertaker for the necessary and reasonable funeral and burial expenses, and to the personal representative, as such, for the necessary and reasonable costs and expenses of administering the estate and prosecuting or compromising the action, including a reasonable attorney's fee, and in case of a death under such circumstances, and when such decedent leaves no such widow, widower, or dependent children, or dependent next of kin, surviving him or her, the measure of damages to be recovered shall be the total of the necessary and reasonable value of such hospitalization or hospital service, medical and surgical services, such funeral expenses, and such costs and expenses of administration, including attorney's fees.

had provided total child care for her minor children five days per week while her former husband, who had custody of the children, travelled on business.[135]

The court adopted as the test for dependency the same standard applied in *Kirkpatrick v. Bowyer*,[136] a case which also involved a claim for damages based partially on the loss of a parent supplying babysitting services, although on a very infrequent basis:

> "Dependency is based on a condition and not a promise, and such dependency must be actual, amounting to a necessitous want on the part of the beneficiary and a recognition of that necessity on the part of decedent, an actual dependence coupled with a reasonable expectation of support or with some reasonable claim [for] support from decedent."[137]

The *Lustick* court further noted that a legal obligation to provide this support is not essential to the success of the alleged dependent's claim[138] nor need the dependence be total.[139] Therefore, the court concluded that the father's extended and regular absences created an actual need for care during those periods and that the decedent obviously provided that needed care. This form of support, even though not legally obligated and not total in nature, was held sufficient to sustain a claim under the act.[140]

In *Thomas v. Eads*,[141] a lawsuit for wrongful death was brought on behalf of the estate of a deceased infant. The infant died as a result of the same auto accident that killed his mother, but he survived her for a period of approximately one-half hour. The defendant

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[135]403 N.E.2d at 1130-32. The dissolution decree had been entered of record only three days before the accident which killed the mother. Because the terms of the temporary agreement and the final decree were the same, the court approved the introduction of evidence relating to the relationship of the decedent and her children from the date of the temporary agreement to the date of the accident. 403 N.E.2d at 1133. The court specifically noted that had the terms of the final decree differed from those of the temporary agreement, only evidence relating to the period after the entry of the final decree would have been admissible. *Id.*

[136]131 Ind. App. 86, 169 N.E.2d 409 (1960).

[137]403 N.E.2d at 1131 (quoting 131 Ind. App. at 94, 169 N.E.2d at 412).

[138]403 N.E.2d at 1131 (citing Novak v. Chicago & Calumet Dist. Transit Co., 235 Ind. 489, 135 N.E.2d 1 (1956); New York Cent. R.R. v. Johnson, 234 Ind. 457, 127 N.E.2d 603 (1955)).

[139]403 N.E.2d at 1132 (citing Northern Ind. Power Co. v. West, 218 Ind. 321, 32 N.E.2d 713 (1941)).

[140]403 N.E.2d at 1132. Because the trial court found evidence that the decedent contributed care, attention, and domestic services to her children, but no portion of her earnings, it properly excluded all evidence relating to the decedent's income or earning ability. *Id.* at 1132-33.

[141]400 N.E.2d 778 (Ind. Ct. App. 1980).

appealed from a judgment entered against him in the trial court and argued that the infant had not survived in the sense contemplated by the Wrongful Death Act.[142]

In its analysis of this case, the court of appeals relied heavily upon the decision in *Shipley v. Daly*,[143] a 1939 case which essentially supported the defendant's position that the definition of a survivor under the Wrongful Death Act refers to one who survives at least to the time of the entry of judgment in the wrongful death action. The court noted that there had been several revisions of the Wrongful Death Act since the date of the *Shipley* decision but stated that no apparent legislative effort has been made to alter that decision.[144] Therefore, the court concluded that the *Shipley* decision, which requires survival until the date of the entry of judgment to qualify as "surviving" under the Act, reflects the legislature's position on this issue.[145]

H. Liability of Government Officials

In *Thrasher v. Van Buren Township*,[146] the court of appeals recognized a new basis upon which one may seek to recover damages from a government official. In that case, property owners brought suit against their township and township trustee for damages resulting from the trustee's failure to comply with his statutory duty to repair a partition fence and his refusal to obey a writ of mandate directing him to do so.[147] Pursuant to the decision of the Indiana Supreme Court in *Indiana Alcoholic Beverage Commission v. State ex rel. Harmon*,[148] the *Thrasher* court noted that Indiana's mandate statute[149] authorizes damages only if attributable to

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[142]*Id.* at 780 (citing IND. CODE § 34-1-1-2 (1976)).

[143]106 Ind. App. 443, 20 N.E.2d 653 (1939). In *Shipley*, the widow of the decedent died during the lawsuit, and the court held that all right of recovery, even the recovery for the benefit of the so-called death creditors, terminated at her death. *Id.* at 447, 20 N.E.2d at 655. Since that decision, the statute was amended in 1965 to alter the *Shipley* result only insofar as it related to death creditor beneficiaries who are now protected whether or not the widow or widower, dependent children or dependent next of kin survive.

[144]400 N.E.2d at 783.

[145]*Id.*

[146]394 N.E.2d 215 (Ind. Ct. App. 1979).

[147]*Id.* at 216-17.

[148]379 N.E.2d 140 (Ind. 1978).

[149]IND. CODE §§ 34-1-58-1 to -8 (1971) (current version at *id.* §§ 34-1-58-1 to -8 (1976)). IND. CODE § 34-1-58-4 (1976), as did the 1971 version of this section, provides:

> Said action for mandate shall stand for issue and trial, and issues of law and fact may be joined, and amendments, continuances and appeals granted therein, as in other civil actions; and in rendering final judgments in said actions, if the finding and judgments be for the plaintiff, the court shall grant

"the subjection of the plaintiff to the rigors, vexation, and expense of trial on issues of fact."[150] The statute does not authorize other types of damages, such as damages for loss of use of real estate, loss of profits and wages, and mental anguish; the types of damages which were sought by the Thrashers in this case.[151]

Nonetheless, the court concluded that the damages sought by the plaintiff in this case were not governed by the mandate statute—its scope was limited to the damages which might be recovered in the same action in which the mandate was originally sought. Because this case arose from the trustee's failure to obey the mandate, damages for the period of time beginning with the date of the entry of the mandate were held recoverable.[152] The court determined that it saw no reason to distinguish between this factual situation and the recognized rule that a township trustee may be held liable for negligence in the performance of a ministerial duty or of a discretionary duty when a private duty is owed to the plaintiff.[153] The court concluded that a strong public policy to allow damages to persons whose rights have been infringed would be thwarted if the plaintiffs in this case were not permitted recovery.[154]

In *Holt v. City of Bloomington*,[155] a technical issue arose with regard to the computation of post-judgment interest on a money judgment rendered under the Tort Claims Act. The Act provides in this regard that:

> A claim or suit settled by, or a judgment rendered against, a governmental entity shall be paid by it not later than one hundred eighty (180) days after settlement or judgment, unless there is an appeal, in which case not later than one hundred eighty (180) days after a final decision is rendered. If payment is not made within one hundred eighty (180) days, the governmental entity is liable for interest from the date of settlement or judgment at an annual rate of eight percent (8%) . . . .[156]

The court of appeals concluded that the plain meaning of this

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and adjudge to the plaintiff such relief, and such only, as he may be entitled to under the law and facts in such action, together with damages as in actions for false returns, and costs shall be awarded as the court may direct.

[150]394 N.E.2d at 218 (quoting 379 N.E.2d at 144).

[151]394 N.E.2d at 218.

[152]*Id.* at 219-20.

[153]*Id.* at 218 (citing Seymour Nat'l Bank v. State, 384 N.E.2d 1177 (Ind. Ct. App. 1979); Board of Comm'rs v. Briggs, 167 Ind. App. 96, 337 N.E.2d 852 (1975)).

[154]394 N.E.2d at 219.

[155]391 N.E.2d 829 (Ind. Ct. App. 1979).

[156]IND. CODE § 34-4-16.5-17 (Supp. 1980).

statute is to permit the governmental entity to pursue its appellate remedies to the fullest without risking an interest obligation so long as the judgment is paid within one hundred eighty days after the final decision is rendered in the case. The court expressly held that the term "final decision" refers to the last decision or ruling by any court which considers the case in any posture, whether that be an affirmance or reversal or only a denial of a petition for rehearing or for transfer.[157]

I. Settlement Tools

In *Cooper v. Robert Hall Clothes, Inc.*,[158] the Indiana Supreme Court considered the effects of various settlement devices, such as the release, the convenant not to sue or not to execute, and the loan receipt agreement.[159] *Cooper* concerned a release given by the plaintiff to two of three defendants prior to trial. The release by its express terms excepted the third defendant, Robert Hall Clothes, Inc., from its effect. Nonetheless, the trial court sustained Robert Hall's motion for summary judgment on the ground that the release operated as a release of all joint tortfeasors in the case.[160] The court of appeals reversed this judgment[161] and adopted as the law in Indiana the language of section 885(1) of the Restatement (Second) of Torts,[162] which essentially provides for the construction of any release to effectuate the intent of the parties, even though that intent may be to release less than all joint tortfeasors.[163]

On petition to transfer, Robert Hall argued that the decision to

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[157]391 N.E.2d at 832.

[158]390 N.E.2d 155 (Ind. 1979).

[159]*Id.* at 157. A loan receipt agreement usually provides that the plaintiff receives a loan, without interest, for a specified amount from one or more defendants or potential defendants; he in turn agrees not to execute against or to seek further payment from the lender or lenders and to pursue the other defendants or potential defendants for the full amount of his claim; if the plaintiff's recovery from the other tortfeasors exceeds the specified amount of the loan, he is to repay it; but, if he is unable to recover more than the amount of the loan or if he loses the case completely, whether in the trial court or on appeal, no repayment is required. *See* Northern Indiana Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 250 N.E.2d 378 (1969).

[160]390 N.E.2d at 157.

[161]Cooper v. Robert Hall Clothes, Inc., 375 N.E.2d 1142 (Ind. Ct. App. 1978), *overruled*, 390 N.E.2d 155 (Ind. 1979).

[162]RESTATEMENT (SECOND) OF TORTS § 885(1) (1979) provides in pertinent part as follows: "A valid release of one tortfeasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them."

[163]The court's opinion focused on the law regarding the release of less than all *joint* tortfeasors. This case, and the principles of law set forth in it, are not necessarily applicable to a case involving independent or successive tortfeasors.

adopt section 885(1) and overrule the traditional Indiana rule[164] was error.[165] The supreme court agreed[166] and expressly rejected the applicability of the Restatement rule in Indiana.[167] In so doing, the supreme court discussed the differences in form between a release and other instruments used as settlement tools, such as covenants not to sue, covenants not to execute, and loan receipt agreements. A release is an abandonment or relinguishment of a claim for damages while the other instruments are merely statements of the plaintiff's election not to proceed against one of several tortfeasors. The court concluded that a reservation or exception of a cause of action is inconsistent with the concept of a release and that a reservation clause in a release is, therefore, of no force and effect.[168] The court further determined that it would not indulge in the subterfuge of calling a document that was obviously a release, and in fact titled as such, anything else.[169]

The result then was a decision which expressly affirmed the traditional rule in Indiana regarding the effect of a release of one joint tortfeasor. This rule, which emphasizes form over substance, requires the utmost care by plaintiffs and their counsel in settlement negotiations. It is not enough to express an exception to the release of all joint tortfeasors. The settlement documents themselves must be in a form approved by the Indiana appellate courts as effective to be used in settlement with less than all joint tortfeasors.[170]

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[164]*See* Bedwell v. DeBolt, 221 Ind. 600, 50 N.E.2d 875 (1943); Scott v. Krueger, 151 Ind. App. 479, 280 N.E.2d 336 (1972).

[165]390 N.E.2d at 157.

[166]The court of appeals in its opinion relied on Wecker v. Kilmer, 260 Ind. 198, 294 N.E.2d 132 (1973), as evidence of the increasing disfavor with which Indiana's courts have looked upon this traditional rule that the release of one joint tortfeasor is the release of all. As the supreme court's opinion pointed out, however, *Wecker* concerned a release given to one of two independent and successive tortfeasors. 390 N.E.2d at 158.

[167]390 N.E.2d at 157.

[168]*Id.*

[169]*Id.* at 157-58.

[170]There have been several cases decided during the survey period in which the loan receipt agreement was successfully used as a mechanism to settle with less than all joint tortfeasors. *See, e.g.*, Barker v. Cole, 396 N.E.2d 964 (Ind. Ct. App. 1979).

XVIII. Workmen's Compensation

JOHN A. RADER*

A. Assignment of Errors

Counsel continue to disregard the requirement that a certified copy of an assignment of errors be included in the transcript on appeal.[1] The assignment need only state that "the award of the full board is contrary to law. . . ."[2] The court may then review both the sufficiency of the findings of fact utilized to sustain the award and the sufficiency of the evidence to sustain the findings of fact.[3] During the survey period, the court of appeals has summarily disposed of two cases not containing this prerequisite by dismissing the appeals by memorandum "not for publication" opinions,[4] citing *Slinkard v. Extruded Alloys*.[5] Although the statutory mandate has been firmly established[6] and consistently enforced by the court with little hope of exception,[7] the court's practice of specifically referring to the inclusion of the assignment[8] has alerted few appellants in the survey period.

B. Permanent Total Disability

The court of appeals established the definition of permanent total disability in *Perez v. United States Steel Corp.*[9] To establish permanent total disability, an injured workman must show "that *he cannot carry on reasonable types of employments*."[10] Necessarily, however, the ability to assume reasonable types of employment requires physical fitness, mental fitness, and availability of employment opportunities.[11] Superimposed on these factors is the per-

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[1]IND. CODE § 22-3-4-8 (1976); IND. R. APP. P. 7.2(A)(1).

[2]IND. CODE § 22-3-4-8 (1976); *see generally* Penn-Dixie Steel Corp. v. Savage, 390 N.E.2d 203, 205 (Ind. Ct. App. 1979).

[3]Penn-Dixie Steel Corp. v. Savage, 390 N.E.2d 203, 205 (Ind. Ct. App. 1979).

[4]*See* IND. R. APP. P. 15(A)(3). The author has personal knowledge of these cases since he has served as a single hearing judge for the Industrial Board since 1977.

[5]150 Ind. App. 479, 277 N.E.2d 176 (1971).

[6]*See* IND. CODE § 22-3-4-8 (1976); *see generally* B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA, § 12.14 (1950 & Supp. 1976).

[7]Means v. Seif Material Handling Co., 157 Ind. App. 492, 300 N.E.2d 895 (1973).

[8]*See, e.g.*, Seagram & Sons v. Willis, 401 N.E.2d 87 (Ind. Ct. App. 1980); White v. Woolery Stone Co., 396 N.E.2d 137 (Ind. Ct. App. 1979).

[9]359 N.E.2d 925, 927-28 (Ind. Ct. App. 1977).

[10]*Id.* at 927 (quoting B. SMALL, *supra* note 6, § 9.4) (emphasis in original).

[11]359 N.E.2d at 928 (quoting B. SMALL, *supra* note 6, § 9.4).

manency of the injury. Therefore, applicaiton of the definition remains unsettled[12] as each party presents medical evidence to demonstrate the claimant's condition.

In *White v. Wollery Stone Co.*,[13] White underwent surgery to remove cartilage from his knee. He suffered a lengthy recuperation as a result of complications and sought a declaration by the Industrial Board that his injury resulted in permanent total disability. The Board disagreed, and found that the injuries resulted in a fifty percent permanent partial impairment of his left lower extremity.[14] The court of appeals affirmed, deferring to medical testimony which had established the extent of the claimant's injuries, the likelihood that the claimant could return to his old job, and the parameters which the claimant should follow in seeking employment.[15]

In *Penn—Dixie Steel Corp. v. Savage*,[16] Savage suffered burns and a hernia in a work-related accident. After receiving temporary total disability benefits for approximately fifty-one weeks, he returned to work. Subsequently, he was unable to continue working because he experienced mental problems allegedly precipitated by the previous injury.

The court of appeals affirmed the Board determination that Savage was 100% disabled.[17] In support of this finding, the Board relied on the testimony of Savage's wife and daughter concerning Savage's mental state.[18] Moreover, the Board considered the psychiatrist's testimony that Savage's injury was "a significant emotional factor in his mental demise."[19] The psychiatrist also testified that Savage was totally disabled.[20]

The standard of review is clear. The reviewing court will not weight evidence and will only consider evidence tending to support the Board's decision.[21] Thus, the Board's determination of permanent total disability, if based on sufficient evidence, will not be disturbed on appeal.[22] Moreover, although a finding of permanent partial im-

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[12]Although findings by the Social Security Administration have been rejected by the Industrial Board as irrevelant, many of the same factors leading to a favorable determination there seem applicable to the present inquiry. *See generally* H. McCormick, Social Security Claims and Procedures (2d ed. 1978).

[13]396 N.E.2d 137 (Ind. Ct. App. 1979).

[14]*Id.* at 139.

[15]*Id.* at 139-40.

[16]390 N.E.2d 203 (Ind. Ct. App. 1979).

[17]*Id.* at 204-05, 208.

[18]*Id.* at 207.

[19]*Id.*

[20]*Id.*

[21]White v. Woolery Stone Co., 396 N.E.2d at 140.

[22]*Id. See* Dennison v. Martin, Inc., 395 N.E.2d 826, 828 (Ind. Ct. App. 1979); Penn-Dixie Steel Corp. v. Savage, 390 N.E.2d at 208.

pairment does not exclude a finding of permanent total disability,[23] when there is evidence of both, the Board's finding of only some degree of permanent partial impairment is sustainable.[24]

C. Liability for Contractor's Employees

A little known provision of the Workmen's Compensation Act was discussed by the court of appeals in *Indiana Bell Telphone Co. v. Owens*.[25] In that case, Indiana Bell hired an independent contractor to complete utility construction for the telephone company. One of the contractor's employees, Owens, suffered a compensable injury while working on the project. The Industrial Board, relying on Indiana Code section 22-3-2-14,[26] found Indiana Bell secondarily liable for the statutory benefits available to the employee. However, the court of appeals reversed and remanded the case to the Industrial Board because the Board's findings of fact were insufficient to show that Indiana Bell had actually contracted with Owens' employer.

The statutory section upon which the Industrial Board relied[27] imposes upon those persons delineated therein, including a homeowner, the duty to verify that those with whom they contract carry compensation insurance on their employees.[28] Similar provisions without dollar limitation apply for contractors who sublet any work.[29] Failure to exact a cetificate from the Industrial Board makes one liable to the same extent as the contractor.[30] A right of subrogation exists against the contractor but this is seen as more illusory than real because exhaustion of the immediate employer's liability is required[31] and the contractor not carrying insurance is often judgment-proof. More than one homeowner has been surprised to discover this provision. Furthermore, because homeowners' policies contain a standard exclusion for losses covered by workmen's compensation, the homeowner often incurs personal liability. Additionally, the certificate from the Board provides protection for only ten days.[32] Therefore, in addition to requesting a certificate from the

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[23]Perez v. United States Steel Corp., 359 N.E.2d at 929.

[24]396 N.E.2d at 140.

[25]399 N.E.2d 443 (Ind. Ct. App. 1980).

[26]IND. CODE § 22-3-2-14 (1976).

[27]*Id.*

[28]*Id.* The contract must exceed $500.

[29]*Id.*

[30]*Id.* The Industrial Board's procedural rules require that each request for a certificate be accompanied by a pre-addressed, stamped envelope. 630 IND. AD. CODE § 1-1-37 (1979).

[31]*See* IND. CODE § 22-3-2-14 (1976). Exhaustion of the immediate employer's liability is generally regarded as the return on execution unsatisfied.

[32]*Id.* § 22-3-5-5.

Board, anyone contracting for services should also request from the contractor a certificate of insurance, which provides for notification in the event of cancellation. Moreover, a homeowner should purchase a workmen's compensation contingency endorsement for his homeowner's policy.

D. Tolling of Modification Period for Fraud

In *Gayheart v. Newnam Foundry Co.*,[33] an employee filed a civil action for fraud against an employer and his insurer after the Industrial Board had dismissed the employee's claim for benefits under the Workmen's Compensation Act because the statute of limitations had expired. Based on his failure to exhaust administrative remedies and the *res judicata* effect of the original Industrial Board proceedings,[34] the trial court granted summary judgment against the employee in the fraud action. The court of appeals held that the doctrine of *res judicata* could not operate to prevent the trial court from addressing the issue of fraud since the Industrial Board had no jurisdiction to consider fraud as a ground for tolling the statute of limitations.[35] In vacating the court of appeals' decision, the supreme court held that the Board always has jurisdiction to determine whether a party was fraudulently induced into foregoing the filing of an application for modification under Indiana Code section 22-3-3-27.[36] Furthermore, the court held that if fraud were found, the modification time limitation would be tolled at the moment the fraud was perpetrated.[37] Clearly, an employee would be protected by this expansion of the Board's jurisdiction. The opinion however, deals only with the limitation period for a modification of an award. Thus, the employer would also be protected because his compensation personnel, who would have knowledge of the occurrence of an accident and surrounding circumstances, would be in charge of the file.

Because the opinion is limited to modifications under Indiana Code section 22-3-3-27, absent some pronouncement, the general limitation period for the initial filing of claims found in Indiana Code section 22-3-3-3[38] would be applicable as a nonclaim statute.[39] Thus, where no weekly indemnity payments are made, claims should still

[33]393 N.E.2d 163 (Ind. 1979).

[34]*Id.* at 165.

[35]*Id.*

[36]*Id.* at 166.

[37]Id.

[38]IND. CODE § 22-3-3-3 (1976).

[39]*See* Wawrinchak v. United States Steel Corp., 148 Ind. App. 444, 267 N.E.2d 395 (1971). "A nonclaim statute creates a right of action and has inherent in it the denial of a right of action. It imposes a condition precedent—the time element which is a part of

be filed within two years from the date of accident. However, in a modification action, the claimant should fully exercise the right to raise the fraud issue lest it be waived. Nevertheless, he may preserve an action at law for damages if the fraud caused him to forbear filing his claim in an original action.

E. Retaliatory Discharge—Limitations

The landmark case of *Frampton v. Central Indiana Gas Co.*[40] was revisited by the court of appeals in *Scott v. Union Tank Car Co.*[41] The supreme court in *Frampton* held that an employee who alleges that he was discharged in retaliation for filing a compensation claim stated a claim upon which relief could be granted.[42]

In *Scott*, an employee filed a suit against Union more than two years after his dismissal alleging that he had been discharged in retaliation for filing a workmen's compensation claim. The trial court dismissed the suit on the ground that it was barred by the two-year statute of limitations.[43] A divided third district court of appeals also affirmed the dismissal. The court held that a claim alleging retaliatory discharge is tortious in nature, and is therefore subject to the two-year limitations.[44]

Judge Staton's lengthy dissent[45] characterized the employee's action as one of contract, and thus subject to the longer statute of limitations.[46] He noted, however, that after the effective date of Indiana Code section 34-1-2-1.5, a two-year limitations period would be applicable.[47] Thus, currently under both views, filing should occur within two years.

F. Medical Malpractice

In *Stevens v. Kimmel*[48] and in *McLaughlin v. American Oil Co.*,[49]

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the action itself." *Id.* at 451-52, 267 N.E.2d at 399. Furthermore, nonclaim statutes may not be extended "by the disability, fraud or misconduct of the parties," nor are they subject to waiver. *Id.* at 452, 267 N.E.2d at 400 (quoting Donnella v. Crady, 135 Ind. App. 60, 63, 185 N.E.2d 623, 625 (1962)).

[40]260 Ind. 249, 297 N.E.2d 425 (1973). *See generally* B. SMALL, *supra* note 6, § 11.16 (Supp. 1976).

[41]402 N.E.2d 992 (Ind. Ct. App. 1980).

[42]260 Ind. at 253, 297 N.E.2d at 428.

[43]402 N.E.2d at 992. *See* IND. CODE § 22-3-3-3 (1976).

[44]402 N.E.2d at 993.

[45]*Id.* at 993-97 (Staton, J., dissenting).

[46]IND. CODE § 34-1-2-1 (1976).

[47]402 N.E.2d at 994 n.3. IND. CODE § 34-1-2-1.5 (Supp. 1980) became effective Aug. 29, 1977.

[48]394 N.E.2d 232 (Ind. Ct App. 1979).

[49]391 N.E.2d 864 (Ind. Ct. App. 1979).

the court adopted the reasoning found in *Ross v. Schubert*[50] as applicable to malpractice actions against company physicians. In *Stevens*, the plantiff suffered a work related injury and was treated by the company physician. Later, he filed a medical malpractice suit against Dr. Kimmel. Dr. Kimmel claimed that as company physician, he was a co-employee and, therefore, immune from suit. The *Stevens* court reiterated that the company physician is essentially an independent contractor in relation to his patients; therefore, he cannot claim the "in the same employ" immunity found in Indiana Code section 22-3-2-13.[51]

In *McLaughlin*, the court also found that a company physician is not clothed with immunity from a medical malpractice suit.[52] However, the court held that McLaughlin's intentional tort action against his employer was improper.[53] The court refused to accept McLaughlin's argument that because the act which caused his injury was intentional, not accidental, it was not within the purview of the Act.[54] Instead, the court held that the question was not whether the injury was accidental or intentional, but whether it was one arising out of and in the course of employment.[55] Finding that McLaughlin's injury was one arising out of and in the course of employment, the court limited him to the remedies provided by the Act.[56] It is axiomatic that the harmful effects of the treatment of a compensable injury are themselves compensable.[57]

G. Recovery Limitations

Temporary employees from Manpower, Inc. were found to be employees of the firm utilizing Manpower's services in *Fox v. Contract Beverage Packers, Inc.*[58] Fox, a Manpower employee, received workmen's compensation benefits from Manpower's insurance carrier for injuries he sustained while on assignment at Contract Beverages. Fox then brought a suit against Contract, alleging negligence. Fox claimed that his civil suit was appropriate, because Contract was not his employer. The trial court entered summary judgment against Fox, and the court of appeals affirmed.[59] The court

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[50]388 N.E.2d 623 (Ind. Ct. App. 1979).

[51]394 N.E.2d at 233.

[52]391 N.E.2d at 865.

[53]Id. at 866.

[54]*Id.*

[55]*Id.*

[56]*Id.*

[57]*See generally* Seagram & Sons, Inc. v. Willis, 401 N.E.2d 87 (Ind. Ct. App. 1980); B. SMALL, *supra* note 6, §§ 6.19, 8.48.

[58]398 N.E.2d 709 (Ind. Ct. App. 1980).

[59]*Id.* at 710.

reasoned that Contract and Manpower were joint employers of Fox, so that Fox was limited to recovery of workmen's compensation benefits.[60] Manpower's payment of the workmen's compensation benefits did not preclude this result, since joint employers are allowed to contract between themselves as to who carries workmen's compensation insurance.[61] As Fox's employer, Contract could also use the exclusivity provisions of the Act.[62]

H. Statutory Changes

The 1980 Legislative Session produced an amendment[63] to the Township Poor Relief provisions, that a recipient performing work as a satisfaction of conditions of relief was covered by "IC 22-3," presumably referring to the Workmen's Compensation Act[64] and Occupational Disease Act[65] rather than the older and substantially superseded Employer Liability Act.[66]

Two statutory changes made in 1979 became effective during the survey period. The first change to the Workmen's Compensation Act was the increase in the average weekly wages considered in determining compensation benefits.[67] As of July 1, 1979, the average weekly wages were $195, producing a compensation benefit of $130; as of July 1, 1980, average weekly wages were $210, producing a compensation benefit of $140.[68] The statutory maximums were also increased to reflect the higher benefits.[69] Similar changes were made in the Occupational Disease Act.[70]

The other change to the Workmen's Compensation Act involved the extension of the so-called "healing period" from 26 to 52 weeks for accidents occurring on or after July 1, 1979.[71] Nevertheless, benefits for permanent partial impairment remain at seventy-five

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[60]*Id.* at 712.

[61]IND. CODE § 22-3-3-31 (1976).

[62]*Id.* § 22-3-2-6.

[63]Act of 1980, Pub. L. No. 94, 1980 Ind. Acts 1170 (amending IND. CODE § 12-2-1 (1976)). This amendment provides: "[A] recipient performing work under this chapter and the governmental unit for which he works are covered by IC 22-3 with regard to the work performed. In computing benefits under IC 22-3, the wage rate at which the recipient works off the assistance shall be used." 1980 Ind. Acts at 1171.

[64]IND. CODE §§ 22-3-1-1 to -6-3 (1976 & Supp. 1980).

[65]*Id.* §§ 22-3-7-1 to -38.

[66]*Id.* §§ 22-3-9-1 to -11 (1976).

[67]The average weekly wages are determined as of the date of the accident.

[68]IND. CODE §§ 22-3-3-22, -3-8 (Supp. 1980).

[69]*Id.*

[70]*Id.* § 22-3-7-19.

[71]*Id.* § 22-3-3-10. *See also* Occupational Disease Act, IND. CODE § 22-3-7-16 (Supp. 1980).

dollars for accidents after July 1, 1977. Administratively, the Board has determined that an employer is entitled to dollar credit for benefits paid in excess of the healing period as against the permanent partial impairment benefits, and not merely credit for the number of weeks paid at the higher rate for temporary benefits. This practice has not been addressed by the court of appeals and therefore will continue, absent some determination by them.

I. Briefly Noted

In *Davis v. C.P. Lesh Paper Co.*,[72] the claimant was injured in the course of her employment when she was seventeen years old. She filed her claim over two years after the injury, but argued that her "minor" status had tolled the statute of limitations. The court held that under both the current and immediately preceding version of the statute, a minor for all purposes under the Act was a person who had not reached the age of seventeen.[73] Those under seventeen are in some cases entitled to receive double compensation.[74]

Seagram & Sons, Inc., v. Willis[75] provided an interesting factual situation wherein the combined effects of medications prescribed for an industrial injury and alcohol ingested by the injured workman combined to produce his death.[76] The court held that the effects of the industrial accident need not be the sole cause of the death and affirmed the award of compensation.[77] The court also stated that if interest were to be added from the date of death it was a matter for the legislature to include in the statute and not for the court to create.[78]

A finding that an employee was the aggressor in a fight precluded her right to compensation in *Berryman v. Fettig Canning Corp.*[79] The court dismissed the argument that "but for" the employment, the dispute over time cards and riders would not have occurred and held that such a dispute did not arise out of employment.[80] To arise out of the employment it must be a risk reasonably incidental to the employment, either an ordinary risk directly connected with the employment or an extraordinary risk which is only indirectly con-

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[72]394 N.E.2d 207 (Ind. Ct. App. 1979).
[73]*Id.* at 208-09.
[74]IND. CODE § 22-3-6-1 (Supp. 1980).
[75]401 N.E.2d 87 (Ind. Ct. App. 1980).
[76]*Id.* at 88-89.
[77]*Id.* at 92.
[78]*Id.* at 93.
[79]399 N.E.2d 840 (Ind. Ct. App. 1980).
[80]*Id.* at 843.

nected with the employment owing to the special nature of the employment.[81]

In *Coleman v. Indiana Veneers, Inc.*,[82] the plaintiff appealed the Industrial Board's decision to award her only forty percent of her deceased son's income. The court of appeals approved of the Board's "ascertaining" the percentage of support contributed to a partial dependent.[83] Absent precise figures with which to determine the mathematical formula, the court held that the Board's findings were not clearly erroneous.[84]

The other cases decided during the survey period advance no new legal propositions and appear to be limited to their facts.[85]

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[81]*Id.*

[82]395 N.E.2d 874 (Ind. Ct. App. 1980).

[83]*Id.* at 876.

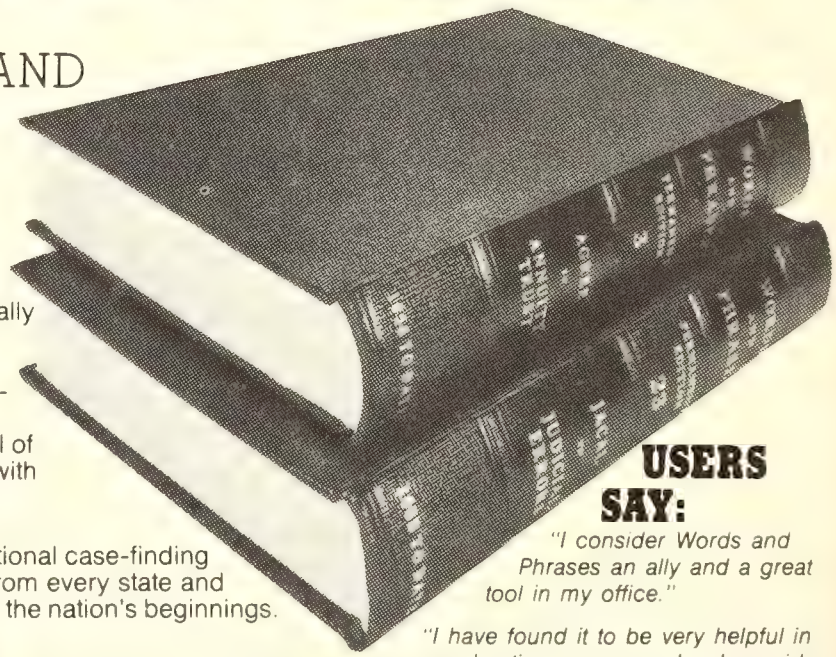
[84]*Id.*

[85]Birge v. Bryant Air Conditioning, 393 N.E.2d 790 (Ind. Ct. App. 1979); Sheller-Globe Corp. v. Parks, 393 N.E.2d 264 (Ind. Ct. App. 1979).

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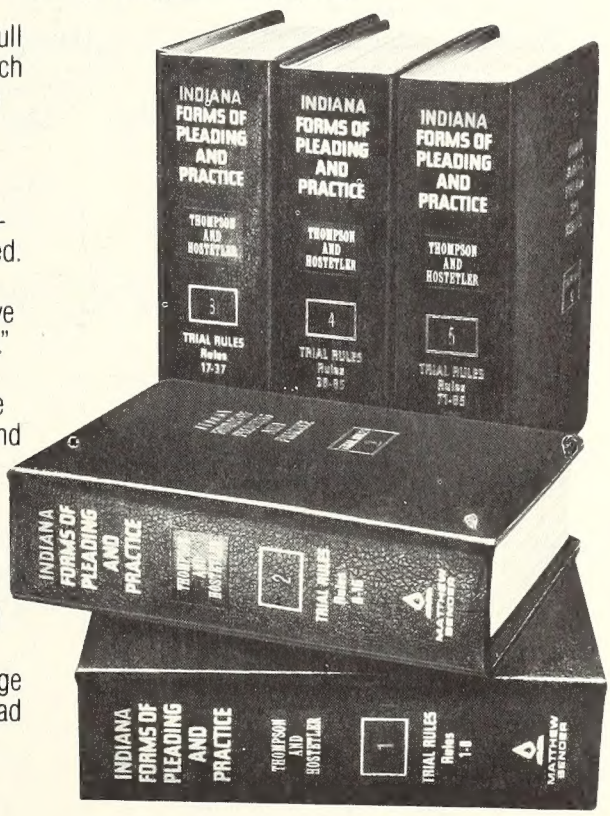
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